No. 90-5744-CFY
Status: GRANTED

Title: Richard L. Chapman, John M. Schoenecker and Patrick Brumm, Petitioners
v.
United States

Docketed:
September 17, 1990

Court: United States Court of Appeals for the Seventh Circuit

Vide:
90-929

Counsel for petitioner: Kelly,T. Christopher, Eisenberg,Stephen, Hassett,P. Scott, Bergerson,Donald

See also:
90-5624

Counsel for respondent: Solicitor General, Bergerson,Donald Thomas

Entry	Date	Note	Proceedings and Orders
1	Sep 17 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 16 1990		Order extending time to file response to petition until November 16, 1990.
5	Nov 14 1990		Brief of respondent United States in opposition filed.
6	Nov 21 1990		DISTRIBUTED. December 4, 1990
8	Dec 3 1990		REDISTRIBUTED. December 4, 1990
10	Dec 10 1990		Petition GRANTED.
			**********
11	Dec 20 1990		Record filed.
		*	one vol.-USCA 7.
12	Dec 28 1990		Record filed.
		*	USDC WD WI-one vol.
13	Jan 2 1991	G	Motion of petitioners for appointment of counsel filed.
14	Jan 7 1991		DISTRIBUTED. January 11, 1991.
15	Jan 14 1991		Motion for appointment of counsel GRANTED and it is ordered that T. Christopher Kelly, Esquire, of Madison, Wisconsin, is appointed to serve as counsel for the petitioners in this case.
17	Jan 23 1991		Brief of respondent Stanley Marshall in support of petition filed.
18	Jan 24 1991		Brief amici curiae of Drug Policy Foundation, et al. filed.
16	Jan 25 1991		Joint appendix filed.
19	Jan 31 1991		Brief of petitioners Richard L. Chapman, et al. filed.
20	Feb 1 1991		SET FOR ARGUMENT TUESDAY, MARCH 26, 1991. (1ST CASE)
21	Feb 21 1991		CIRCULATED.
22	Feb 21 1991	X	Brief of respondent United States filed.
23	Mar 15 1991	X	Reply brief of petitioners Richard L. Chapman, et al. filed. VIDED.
24	Mar 18 1991	X	Reply brief of petitioner Stanley Marshall filed.
25	Mar 26 1991		ARGUED.

90-5744 (2)

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

7th Circuit Case Nos.
89-3364, 89-3390, 89-3391

T. CHRISTOPHER KELLY
Attorney for petitioner
Richard L. Chapman
KELLY LAW OFFICES
121 South Hamilton Street
Madison, Wisconsin 53703
608/255-6607

P. SCOTT HASSETT
Attorney for petitioner
John M. Schoenecker
LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703
608/256-9031

STEPHEN J. EISENBERG
Attorney for petitioner
Patrick Brumm
EISENBERG LAW OFFICES, S.C.
121 East Wilson Street
P.O. Box 1069
Madison, Wisconsin 53701
608/256-8356

QUESTIONS PRESENTED

1. Whether a carrier to which LSD is adhered for ease of delivery constitutes a "mixture or substance containing" LSD within the meaning of the federal sentencing guidelines and 21 U.S.C. sec. 841(b)(1)(B)(v), so that the weight of the carrier is included in the total weight that determines the guideline sentence and triggers mandatory minimum sentences.

If the first question is answered affirmatively, two constitutional questions are presented:

2. Whether a defendant has a fundamental right to substantive fairness in sentencing, requiring strict scrutiny of a claimed impairment of that right.

3. Whether basing sentences for LSD distribution upon the arbitrary weight of the LSD carrier violates a defendant's right to due process of law.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petition of Richard L. Chapman, John M. Schoenecker, and Patrick Brumm respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appelas for the Seventh Circuit, entered in the above-entitled proceedings on July 17, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at ___ F.2d ___ (7th Cir. 1990) and is reproduced in the appendix, page 1A, *infra*.

The memorandum decision of the United States District Court for the Western District of Wisconsin (Crabb, J.) has not been reported. It is reproduced in the appendix, page 26A, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was rendered on July 17, 1990, affirming petitioners' judgments of conviction entered on October 24, 1989. Jurisdiction was conferred upon the court of appeals generally by 28 U.S.C. sec. 1291 and specifically by 18 U.S.C. sec. 3742, authorizing appeals from sentences imposed after November 1, 1987 which are alleged to violate the law or to misapply the sentencing guidelines. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1) and Rule 20.1 of the Rules of the Supreme Court of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

21 U.S.C. sec. 841 provides in relevant part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ...
>
> (b) Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> ...
>
> (1)(B) In the case of a violation of subsection (a) of this section involving --
>
> ...
>
> (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
>
> ...
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years ...

Amendment V to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

An indictment filed May 3, 1989 charged each petitioner with distributing approximately five grams of LSD in violation of 21 U.S.C. sec. 841. Each petitioner entered a guilty plea.

Prior to sentencing, each defendant moved the court to declare the five year mandatory minimum sentencing provision of 21 U.S.C. sec. 841(b)(1)(B)(v), and the federal sentencing guidelines, unconstitutional as applied to LSD distribution. For the purpose of the motion, the government stipulated that LSD is sold by the dose, not by weight.

Federal sentencing guidelines base the approved sentencing range in LSD cases upon the gross weight of any "mixture or substance containing" the LSD. *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989), construed the guidelines and sec. 841(b)(1)(B)(v) to include the blotter paper or other carrier to which LSD is adhered in the gross weight that determines guideline sentences. Petitioners contended that basing sentences upon the arbitrary weight of the LSD carrier produces irrational results and violates their right to due process of law. The court denied the motions. (*See* page 26A, *infra.*) Petitioner Chapman was sentenced to a 96 month prison term. Petitioner Schoenecker received a 63 month sentence. Petitioner Brumm was given the mandatory minimum five year sentence.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. After oral argument before a three judge panel, the court, on its own motion, ordered a rehearing *en*

banc. By a 6 to 5 vote, the court of appeals affirmed the trial court's ruling. Petitioners seek Supreme Court review of the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

Introduction

Congress and the sentencing commission have visited progressively harsher penalties upon drug retailers as they distribute larger quantities of controlled substances. As the amount (measured by weight) of the distributed substance increases, the corresponding penalties increase. Sufficiently large weights trigger mandatory minimum sentences.

Federal legislation and the sentencing guidelines generally require the weight of any inert substance mixed with the controlled substance to be included in the gross weight that determines the sentence. If cocaine is mixed or "cut" with quinine, for instance, the total weight of the mixture will determine the sentence. This is a reasonable approach to measuring culpability in the case of cocaine, because mixing cocaine with an inert substance allows the retailer to market the drug to a greater number of people. Since cocaine is sold by weight, adding to the weight of the cocaine adds to the retailer's profits.

This rationale for basing a sentence upon the total weight of a mixture containing a controlled substance loses its validity when applied to a drug that is not sold by weight. LSD is sold by the dose. To increase the convenience of delivery, doses of LSD are adhered to inert carriers. The carrier may be relatively heavy (e.g., a sugar cube) or relatively light (e.g., a gelatin

capsule). Regardless of the type or weight of the carrier, the strength, purity, and price of the dose will remain the same. The choice of the carrier, and the weight of any particular carrier, is arbitrary, without relevance to the dealer's culpability. It is the number of doses sold, not the weight of the carrier holding the doses, that measures an LSD retailer's success in the marketplace.

Yet the sentencing guidelines, and the statute creating mandatory minimum sentences in LSD cases, treat LSD as if it were, like cocaine, sold by weight. The statute and guidelines require sentences to be based upon the gross weight of any "mixture of substance containing" a detectable amount of LSD. These words were interpreted by the court below to include the inert carrier to which LSD is adhered. If the court's interpretation is correct, the dealer who sells one hundred doses of LSD on sugar cubes may receive a much longer sentence than a dealer with an identical criminal record who sells one thousand doses of LSD on a lighter carrier, such as gelatin capsules.

Counting the weight of the carrier requires courts to base sentences upon an arbitrary factor. The weight of a drug carrier is truly an irrelevant consideration when the drug is not sold by weight. When the arbitrary weight of a drug carrier is counted in the gross weight that determines the sentence, courts are forced to impose widely disparate sentences for identical conduct, based only upon the dealer's good or bad fortune in using a lighter or heavier carrier.

The majority and dissenting opinions in the court of appeals' decision agree that the statute and guidelines governing sentencing of defendants convicted of drug crimes may lead to unfair or "erratic" results when applied to LSD distributors. Nonetheless, the court declined to interpret the statute and guidelines in a way that would have avoided the problem, and found no constitutional infirmity in a sentencing scheme that assures arbitrary results.

The sharply divided court, sitting *en banc*, held that a defendant's right to due process of law does not protect the defendant from a sentencing scheme that compels judges to base sentences upon an arbitrary factor. A philosophical debate at the heart of constitutional law echoes through the majority and dissenting opinions: whether due process of law requires a governmentally imposed deprivation of life, liberty, or property to be substantively, as well as procedurally, fair. In a dissent unusual for its frank discussion of the conflicting judisprudential philosophies that inform the substantive due process debate, Judge Posner contrasted "the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as 'equal protection of the laws') authorize judges to enrich positive law with the moral values and practical concerns of civilized society." *United States v. Chapman*, No. 89-2420, slip

op. at 43 (7th Cir. July 17, 1990)(Posner, J., dissenting). Judge Posner noted that the positivist approach, "applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment" while the natural law approach "leads to a freer interpretation, one influenced by norms of equal treatment ...." *Id.*

While no case is likely to provide a vehicle for the ultimate resolution of this debate, Supreme Court review of this case can at least advance the law by settling some troubling questions:

1. When a sentencing scheme requires a sentence to be based in part upon an arbitrary factor, compelling sentences that vary drastically when compared to other sentences imposed upon identically situated and equally culpable offenders, should the sentencing scheme be interpreted to avoid dependence upon the arbitrary factor?

2. Is fairness in sentencing a fundamental right, so that a claimed impairment of that right must be strictly scrutinized in determining whether the defendant's right to due process of law has been violated?

3. If the sentencing scheme is interpreted in a way that makes sentences hinge upon an arbitrary factor (i.e., the weight of the LSD carrier), does the sentencing scheme violate the defendant's right to due process of law?

The Supreme Court should grant review in this case to provide guidance both to lower courts confronting these recurring questions, and to legislatures and sentencing commissions in creating (or improving) sentencing schemes that address drugs that are not sold by weight.

I. THE WORDS "MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT" OF LSD SHOULD BE CONSTRUED TO EXCLUDE THE CARRIER TO WHICH LSD IS ADHERED

The government stipulated that LSD is not sold by weight. Rather, it is sold by the dose, or "hit." A dose of LSD weighs about 0.05 milligrams. Because the dose is so small, it is typically adhered to a carrier prior to delivery to a retail consumer. The nature of the carrier is limited only by the retailer's imagination. Gelatin capsules and blotter paper appear to be the most common, but other substances have been employed, including sugar cubes and animal crackers. Committee Report, *Dependence on LSD and Other Hallucinogenic Drug*, 202 J. Am. Medical Asso. 47, 47 (October 2, 1967).

While the weight of a dose of LSD remains fixed, the weight of the carrier to which it is adhered will vary: sugar cubes weigh more than blotter paper, which weighs more than a gelatin capsule.[1] Since there are no "industry standards" for drug dealers, the weight of carriers of the same nature may vary from

[1]The 1,000 doses of LSD that were distributed in the *Chapman* case, together with the blotter paper to which they were adhered, weighed about 5.7 grams. An identical number of doses of LSD adhered to gelatin capsules weighed 2.25 grams in *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987).

retailer to retailer: some blotter papers, for instance, may be heavier than others.[2] All of this makes little difference to the consumer. So long as the LSD is delivered in some convenient form, it will not generally matter to the consumer whether the carrier consists of lighter blotter paper, heavier blotter paper, or gelatin capsules. The consumer is interested in buying, and the retailer is interested in selling, a specified number of doses of LSD. Neither party is likely to give much thought to the weight of the carrier that holds the LSD.[3]

The weight of the carrier is crucial, however, to the sentence imposed for the delivery. The sentencing statute imposes a five year mandatory minimum term of imprisonment for selling one gram or more of a "mixture or substance containing a detectable amount" of LSD. 21 U.S.C. sec. 841(b)(1)(B)(v). If blotter paper is a "mixture or substance containing" the LSD adhered to it, sales of relatively modest amounts of LSD will trigger the mandatory minimum sentence.

The sentencing guidelines track the language of sec.

[2]It appears, for instance, that blotter paper used by a defendant in a companion appeal to the *Chapman* case weighed substantially more than the blotter paper used by the *Chapman* defendants. *See Chapman*, slip op. at 4 n.1.

[3]Of course, if the *Chapman* decision remains the law, sophisticated dealers will begin to use the lightest carriers they can find. Deliveries of larger quantities may be made in liquid or crystallized form to avoid the carrier weight. Ironically, since lighter carriers are likely to be smaller and less detectable by law enforcement agencies, the *Chapman* decision may make the drug war in the realm of LSD less winnable by encouraging dealers to minimize the size, weight, and use of LSD carriers.

841(b)(1)(B)(v). The footnote to the Drug Quantity Table, sec. 2D1.1(c), **Federal Sentencing Guidelines**, states that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Thus, if the LSD carrier is treated as a mixture or substance containing LSD, a heavier carrier will place the defendant in a guideline range calling for a longer sentence.

Authority is in conflict as to whether an LSD carrier is a "mixture or substance containing" LSD withing the meaning of the statute and guidelines. Most courts addressing the issue have, without significant analysis, concluded that LSD carriers fall within the plain meaning of the words "mixture or substance containing" LSD.[1] Interestingly, while the Court of Appeals for the Seventh Circuit came to the same conclusion (although the issue was not raised or briefed by the defendant) in *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989), the author of the *Rose* decision, dissenting in *Chapman*, changed his mind and adopted the view that LSD carriers are not included within the intended meaning of the words "mixture of substance containing" LSD. *Chapman*, slip op. at 43 (Posner, J., dissenting).

One court has agreed with the construction favored by the

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[1] *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989); *United States v. Elrod*, 898 F.2d 60 (6th Cir. 1990); *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990); *United States v. Larsen*, 904 F.2d 563 (10th Cir. 1990).

Chapman dissenters. *United States v. Healy*, 729 F. Supp. 140. (D.D.C. 1990), holds that LSD carriers are not a "mixture or substance containing" LSD. The *Healy* court's interpretation is supported both by the ordinary meanings of "mixture" and "substance" and by a common sense understanding of those words in the context of drug distribution. LSD is typically sprayed onto blotter paper in a solution of alcohol. When the alcohol dissolves, the LSD remains adhered to the paper. *Chapman*, slip op. at 3. Yet the LSD is no more a part of a "mixture" with the blotter paper than glue adhered to the back of a postage stamp is part of a "mixture" with the stamp.

Nor is it sensible to view an LSD carrier as a "substance containing" LSD. Although cocaine can be delivered in a glass jar, and although the glass jar is undeniably a "substance" which "contains" the cocaine, all agree that the weight of the jar is not to be counted in determining a sentence for cocaine distribution. When heroin is sold in a capsule, the weight of the capsule is not counted for the purpose of sentencing, even though the capsule is literally a "substance" which "contains" the heroin. *See Chapman*, slip op. at 30-31 (Cummings, J., dissenting) and cases cited. If one dose of LSD were dissolved into a glass of orange juice, it would be absurd to count the weight of the glass, much less the juice, in determining the weight of the LSD. It is no more logical to count the weight of the blotter paper or capsule or sugar cube that "contains" LSD.

It is a cardinal rule that statutes should be construed to

avoid absurd results. *Sheridan v. United States*, 487 U.S. 392, 402 n.7 (1988). It is equally important to avoid constructions that cast doubt upon the statute's constitutionality. *Public Citizen v. U.S. Dept. of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2572, 105 L.Ed.2d 377, 399 (1989). These rules of construction suggest that the *Healy* court, and the dissenters in *Chapman*, properly construed the words "mixture or substance containing" LSD to exclude the LSD carrier.

The federal sentencing guidelines were intended to bring a degree of uniformity to sentences imposed upon similar offenders for similar crimes. As construed by the court below, the sentencing scheme mocks that purpose. The sentencing scheme mandates that identically situated defendants who distribute the same number of identical doses of LSD be given vastly different sentences if they have selected LSD carriers of substantially different weights. The statutory interpretation adopted by the majority of the court below ironically breeds a lack of uniformity in sentences imposed upon otherwise identical and equally culpable offenders.

The Supreme Court should review the conflict between the *Healy* decision and the *Chapman* decision, as the question of the correct interpretation of the words "mixture of substance containing" LSD has arisen frequently and will likely continue to do so. Given the ready availability and renewed popularity of LSD, more challenges to the sentencing guidelines in LSD cases can be expected. Uncertainty will merely foster more appeals until the

issues raised in this petition are finally decided by the Supreme Court.

II. A SENTENCING SCHEME WHICH REQUIRES SENTENCES TO BE BASED UPON AN ARBITRARY FACTOR VIOLATES THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW

A. The impairment of a criminal defendant's fundamental right to be sentenced fairly must be strictly scrutinized.

Defendants contend that their right to due process of law, and the correlative right to equal protection of the law, was violated when their sentences were based upon an arbitrary factor: the weight of the carrier to which their LSD was adhered. A preliminary issue raised, but not expressly decided, by the court below concerns the standard by which an appellate court should review this claim. Ordinarily, a claim that legislation yields arbitrary results, or that it imposes arbitrary classifications, is reviewed to determine whether the body enacting the legislation could have had a rational basis for believing that the distinction challenged as arbitrary furthers a legitimate governmental interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). When the challenged distinction has an impact upon the exercise of fundamental rights, however, the legislation must be strictly scrutinized, and will survive only if the government has a substantial and compelling interest in the classification. *See, e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969)(right to vote); *Shapiro v. Thompson*,

394 U.S. 618 (1969)(right to travel).

The *Chapman* court applied a rational basis test to 21 U.S.C. sec. 841 and to the sentencing guidelines. The challenged legislation, however, affects a defendant's right to be treated in a nonarbitrary way when the government takes away his or her liberty. The right to liberty is undeniably fundamental to our constitutional scheme. M. Forkosch, **Constitutional Law** sec. 335 at 338 (2d ed. 1969). While the scope of the term "liberty" is subject to intellectual debate[5] and is often viewed as merging with the concept of property,[6] the essence of liberty is freedom from imprisonment. The deprivation of individual liberty must be fairly imposed, and classifications which render the length of the deprivation arbitrary must be strictly scrutinized.

The right to be free from arbitrary deprivations of liberty -- stated differently, the right to be sentenced fairly -- must be regarded as fundamental. Commentators have regarded the general right to "fairness in the criminal justice system as a fundamental right to each individual." 2 R. Rotunda, J. Nowak, & J. Young, **Treatise on Constitutional Law: Substance and Procedure** sec. 18.41 at 700 (1986)(hereinafter **Treatise on Constitutional Law**). Professor Gunther discerns a fundamental right to the "fair administration of justice" from a number of Supreme Court rulings which guarantee fair treatment in the

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[5] *See generally* E. Corwin, **Liberty Against Government** (1948).

[6] Corwin, *supra* note 6, at 327; *Munn v. Illinois*, 94 U.S. 113, 142 (1877).

criminal justice process.[7] G. Gunther, **Individual Rights in Constitutional Law** 407 (2d ed. 1976). The Supreme Court acknowledged the existence of a right to fair treatment when it held that due process requires the review of criminal justice proceedings to assure that defendants are treated fairly throughout the entire course of the proceedings. *Rochin v. California*, 342 U.S. 165, 169 (1952). The Supreme Court reaffirmed the right to fair treatment when it recognized that the due process and equal protection clauses protect defendants against unequal treatment in all stages of the criminal justice system. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

Sentencing is an important aspect of the criminal justice process. It is recognized as a "critical stage" at which the right to be represented by counsel obtains. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). Accordingly, the right to fair and equal treatment in the criminal justice system must include the right to fair treatment in sentencing. **Treatise on Constitutional Law** sec. 18.41 at 703. The right is fundamental. It cannot be impaired simply because a rational reason might be imagined for

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[7] *Jackson v. Indiana*, 406 U.S. 715 (1972)(invalidating distinction between pretrial commitment of incompetent criminal defendants and incompetent noncriminal detainees); *Williams v. Illinois*, 399 U.S. 235 (1970)(holding unconstitutional imprisonment for failure to pay a fine to extent that length of imprisonment exceeds maximum sentence for crime); *Douglas v. California*, 372 U.S. 353 (1963)(constitutional right to appointed counsel on appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956)(indigent defendant entitled to free transcript when pursuing appeal).

doing so.[8]

In *Marshall v. United States*, 414 U.S. 417 (1974), the Supreme Court reported a lower court holding that there is no fundamental right to rehabilitation from narcotics addiction at public expense after conviction of a crime. The petitioner did not challenge the lower court holding, and the Supreme Court did not decide the question. Nonetheless, the Court of Appeals appears to have relied on *Marshall* for the proposition that its scrutiny of the constitutional challenge in this case should be conducted "under the highly deferential rational basis test." *Chapman*, slip op. at 16. A holding that there is no fundamental right to drug rehabilitation at public expense offers scant support for rejecting the fundamental right to be sentenced fairly.

The Supreme Court has never articulated the standard for reviewing substantive due process challenges to sentencing procedures. With appeals from guideline sentences becoming increasingly common, resolution of that standard would greatly benefit lower courts. The Supreme Court should accept review of this case to provide needed guidance to lower courts on a matter of far-reaching constitutional importance.

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[8] *See Marshall v. United States*, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting)(legislative classification which results in imprisonment should not be examined under the minimal standard of rationality appropriate to economic regulation, because such a case "does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls, but the very life and health of a man caught up in the spiraling web of addiction and crime.")

B. Basing a sentence upon an arbitrary factor violates a criminal defendant's right to due process of law.

1. *The Fifth Amendment to the United States Constitution prohibits the arbitrary exercise of governmental power.*

The Fifth Amendment to the United States Constitution prohibits the government from depriving a person of his or her liberty without due process of law. The right to due process has both a procedural and a substantive component. While the notion of substantive due process has been the subject of enduring debate, it has long been recognized that "fair play" is "the essence of due process." *Galvan v. Press*, 347 U.S. 522, 530 (1954). Accordingly, legislation that shocks that sense of fair play violates due process. *Id.*

The narrow majority in *Chapman* considered substantive due process to be "a judicial invention" and an "elusive doctine." *Chapman*, slip op. at 13. Perhaps the boundaries of the concept are elusive. The core of the right is clearly defined. At its heart is the right to be free from the arbitrary exercise of governmental power.

The due process right to be free from arbitrary assertions of governmental power is not a "judicial invention." The phrase "due process" derives from the Magna Charta, but the belief that a governing body is bound by substantive limits can be traced to the medieval acceptance of divine law, and to the eighteenth century philosophy of natural law. Tribe, *Substantive Due Process of Law*, in 4 L. Levy, ed., **Encyclopedia of the American**

Constitution 1797, 1797 (1986). To the American colonists, due process of law was not merely a guaranty of procedural fairness, but "a protection against arbitrary government in general." R. Mott, **Due Process of Law** 123 (1926). By the time of the Revolutionary War, the colonists viewed the due process clause of the Magna Charta as prohibiting the arbitrary exercise of power by officials of the royal government. *Id.* at 142. When the Fifth Amendment due process clause was drafted, the substantive prohibition against governmental arbitrariness was universally understood. *Id.* at 159.

The Supreme Court has historically recognized a substantive right to be free from the arbitrary exercise of governmental power. In an early exprssion of that view, Justice Johnson wrote:

> As to the words of the Magna Charta ... after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 4 Wheat. 235, 244 (1819). The Supreme Court consistently condemned the arbitrary exercise of power throughout the nineteenth century. R. Mott, *supra*, at 266. One of the more frequently cited cases asserting the right to be free from arbitrary governmental decision-making is *Hurtado v. California*, 110 U.S. 516 (1884), which reminded the nation that law "is something more than mere will exerted as an act of power.... Arbitrary power, enforcing its edicts to the injury of the

persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude." *Hurtado*, 110 U.S. at 535-36.

Modern Supreme Court decisions continue to recognize that the government must not be permitted to exercise its power arbitrarily. While substantive due process is no longer seen as prohibiting governmental regulation in the fields of economics and social welfare, *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970), it remains a vital check against the unbridled exercise of arbitrary governmental power. E. Corwin, **The Constitution and What It Means Today** 330 (13th rev. ed. 1973). The Supreme Court continues to recognize that due process of law forbids the government to act arbitrarily. *See, e.g., Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 675 n.10 (1976)(the "critical constitutional inquiry" is whether governmental action "produces arbitrary or capricious results"); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)("The touchstone of due process is protection of the individual against arbitrary action of government."); *U.S. Dept. of Agriculture v. Morend*, 413 U.S. 538 (1973)(exclusion of any household containing an unrelated individual from food stamp eligibility deemed arbitrary and held to violate due process). Thus, whatever its limitations might be as a vehicle for developing "new" constitutional rights or as a means to limit economic or social welfare legislation, the substantive due process standard is alive and well as a protection against arbitrary governmental action.

2. *The Fifth Amendment to the United States Constitution prohibits governmental actions based upon arbitrary classifications of persons.*

The Fourteenth Amendment, which guarantees the right to equal protection of the law, applies by its terms to the states, not to the federal government. The Fifth Amendment right to due process, however, includes an equal protection component. *Schelsinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Equal protection requires legislative classifications to be reasonable in light of the legislation's purpose. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Thus, due process bars a statute wich "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). *Accord, Reed v. Reed*, 404 U.S. 71 (1971)(arbitrary preference given to men over women for position as estate administrator denies right to equal protection of laws).

3. *Basing an LSD distributor's sentence upon the weight of the carrier to which the LSD is adhered mandates arbitrary sentencing and violates due process of law.*

Even if the sentencing scheme at issue in this case is not strictly scrutinized, it fails to satisfy the most minimal demands of due process. The sentencing scheme mandates arbitrariness by requiring sentences to reflect an arbitrary factor: the weight of the carrier to which the LSD is adhered.

The weight of an LSD carrier has no rational relationship to

the amount of LSD distributed, or to the social harm caused by the distributor. LSD is sold by the dose, not by weight. A dose of LSD has the same potency and sells for the same price whether delivered on heavy blotter paper, light blotter paper, a gelatin capsule, a sugar cube, a piece of candy, or an animal cracker. A retailer who sells one thousand doses adhered to blotter paper commits the same crime, makes the same profit, and causes the same social harm, as a retailer who sells one thousand identical doses adhered to gelatin capsules. If the offenders are identical in all other ways, it is arbitrary to sentence them differently. Certainly, it must be deemed unconstitutionally arbitrary to require courts to sentence them differently, yet the sentencing scheme at issue does just that.

The sentencing guidelines, within which sentencing courts are compelled to operate, base sentences upon the weight of the LSD and its carrier. Sentences are enhanced as weight increases. The court in *United States v. Daly*, 883 F.2d 313, 318 (4th Cir. 1989), sympathetic to the absurd results that this scheme causes, charted the different offense levels that identically situated LSD defendants face, varying only the type of LSD carrier:

Carrier	Weight (single dose)	Offense level (100 doses)
sugar cube	2,270.00 mg.	36
blotter paper	14.00 mg.	26
LSD alone	.05 mg.	12

Thus, defendants with identical histories who commit identical

crimes -- the crime of selling one hundred doses of LSD -- must be subject to widely disparate sentences based upon the weight, or absence, of a drug carrier. The dealer who distributes LSD on sugar cubes will pay the highest price; the dealer who distributes LSD without a carrier will receive the shortest sentence. Yet each dealer will have committed exactly the same crime, causing exactly the same social harm. It is irrational to treat the sugar cube dealer more harshly than the blotter paper dealer, or to treat the blotter paper dealer more harshly than the gelatin capsule dealer, or to treat the pure LSD dealer (who is probably at a higher point in the distribution chain) least harshly of all.

The majority opinion in *Chapman* suggests that the threat of arbitrary sentencing under this scheme is theoretical. Arbitrary results in LSD sentences are readily observable. One thousand doses of LSD adhered to gelatin capsules were found to weigh 2.25 grams in *United States v. McGeehan*, 824 F.2d 677, 680 n.4 (8th Cir. 1987). This is less than half the weight of the same number of doses of LSD distributed by the defendants in the *Chapman* case. In *United States v. Johnson*, 888 F.2d 1255, 1256 (8th Cir. 1989), the weight of 4,300 doses of LSD was found, for sentencing purposes, to be 430 milligrams, far less than the weight of the 1,000 doses distributed by the *Chapman* defendants. Thus, the base offense levels of the defendants in *McGeehan* and *Johnson* would be less than the base offense levels to which the *Chapman* defendants were subjected, despite the fact that McGeehan distributed the same number of doses of LSD while Johnson distributed more than four times as many doses.

The articulated purpose of the sentencing scheme is to punish more severely those retailers who deliver larger quantities of controlled substances. *United States v. Savinovich*, 845 F.2d 834, 839 (9th Cir. 1988). Basing sentences upon the weight of the LSD carrier does not rationally advance that end. Dealers who distribute a few doses of LSD on heavier carriers receive longer sentences than dealers who sell substantially greater quantities of LSD on lighter carriers. The absence of any meaningful relationship between the weight of the carrier and the number of doses sold "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). Classifying criminal defendants along arbitrary lines at sentencing violates the defendants' entitlement to equal protection of the law.

The due process and equal protection challenges raised in this case have been addressed only by the *Chapman* court. Given the rapidly increasing number of LSD cases appearing in the federal reporter, the issue is certain to arise again in other circuits, as well as in states that have modeled their drug enforcement legislation after the federal code. The *Chapman* court deemed the issue sufficiently important to require an *en banc* rehearing. The decision sharply divided the court. Sentencing issues in the new world of the federal guidelines which are so divisive, and so likely to arise again and again as the drug

war continues to expand, should be resolved by the Supreme Court.

CONCLUSION

This case presents important constitutional issues squarely and cleanly. No material facts are in dispute; the most relevant facts are established by stipulation. The Supreme Court can save lower courts from years of litigation by accepting review and examining the constitutional implications of legislation that mandates arbitrariness in sentencing.

Dated: September 11, 1990.

Respectfully submitted,

T. CHRISTOPHER KELLY
Attorney for petitioner
Richard L. Chapman
KELLY LAW OFFICES
121 South Hamilton Street
Madison, Wisconsin 53703
608/255-6607

P. SCOTT HASSETT
Attorney for petitioner
John M. Schoenecker
LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703
608/256-9031

STEPHEN J. EISENBERG
Attorney for petitioner
Patrick Brumm
EISENBERG LAW OFFICES, S.C.
121 East Wilson Street
P.O. Box 1069
Madison, Wisconsin 53701
608/256-8356

APPENDIX

Decision of U.S. Court of Appeals 1A
Decision and Order of District Court 26A
Stipulation 32A
Judgment of Conviction (Chapman) 33A
Judgment of Conviction (Schoenecker) 37A
Judgment of Conviction (Brumm) 41A

Before BAUER, *Chief Judge*, and CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Two cases consolidated for decision in banc present three questions concerning the application and constitutionality of the statute and sentencing guidelines that govern sales of lysergic acid diethylamide (LSD). Stanley J. Marshall was convicted after a bench trial and sentenced to 20 years' imprisonment for conspiring to distribute, and distributing, more than ten grams of LSD, enough for 11,751 doses. Patrick Brumm, Richard L. Chapman, and John M. Schoenecker were convicted by a jury of selling ten sheets (1,000 doses) of paper containing LSD. Because the total weight of the paper and LSD was 5.7 grams, a five-year mandatory minimum applied. The district court sentenced Brumm to 60 months (the minimum), Schoenecker to 63 months, and Chapman to 96 months' imprisonment. All four defendants confine their arguments on appeal to questions concerning their sentences.

The three questions we must resolve are these: (1) Whether 21 U.S.C. §841(b)(1)(A)(v) and (B)(v), which set mandatory minimum terms of imprisonment—five years for selling more than one gram of a "mixture or substance containing a detectable amount" of LSD, ten years for more than ten grams—exclude the weight of a carrier medium. (2) Whether the weight tables in the sentencing guidelines likewise exclude the weight of any carrier. (3) Whether the statute and the guidelines are unconstitutional to the extent their computations are based on anything other than the weight of the pure drug. Marshall presents some additional questions concerning his sentence that are important only if we get past these three.

I

According to the Sentencing Commission, the LSD in an average dose weighs 0.05 milligrams. Twenty thousand pure doses are a gram. But 0.05 mg is almost invisible,

so LSD is distributed to retail customers in a carrier. Pure LSD is dissolved in a solvent such as alcohol and sprayed on paper or gelatin; alternatively the paper may be dipped in the solution. After the solvent evaporates, the paper or gel is cut into one-dose squares and sold by the square. Users swallow the squares or may drop them into a beverage, releasing the drug. Although the gelatin and paper are light, they weigh much more than the drug. Marshall's 11,751 doses weighed 113.32 grams; the LSD accounted for only 670.72 mg of this, not enough to activate the five-year mandatory minimum sentence, let alone the ten-year minimum. The ten sheets of blotter paper carrying the 1,000 doses Chapman and confederates sold weighed 5.7 grams; the LSD in the paper did not approach the one-gram threshold for a mandatory minimum sentence. This disparity between the weight of the pure LSD and the weight of LSD-plus-carrier underlies the defendants' arguments.

A

If the carrier counts in the weight of the "mixture or substance containing a detectable amount" of LSD, some odd things may happen. Weight in the hands of distributors may exceed that of manufacturers and wholesalers. Big fish then could receive paltry sentences or small fish draconian ones. Someone who sold 19,999 doses of pure LSD (at 0.05 mg per dose) would escape the five-year mandatory minimum of §841(b)(1)(B)(v) and be covered by §841(b)(1)(C), which lacks a minimum term and has a maximum of "only" 20 years. Someone who sold a single hit of LSD dissolved in a tumbler of orange juice could be exposed to a ten-year mandatory minimum. Retailers could fall in or out of the mandatory terms depending not on the number of doses but on the medium: sugar cubes weigh more than paper, which weighs more than gelatin. One way to eliminate the possibility of such consequences is to say that the carrier is not a "mixture or substance containing a detectable amount" of the drug. Defendants ask us to do this.

2A

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-2420

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STANLEY J. MARSHALL,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 88-30051—Richard Mills, *Judge*.

Nos. 89-3364, 89-3390, and 89-3391

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 89 CR 46—Barbara B. Crabb, *Chief Judge*.

ARGUED JANUARY 22, 1990, and APRIL 18, 1990
REARGUED IN BANC MAY 30, 1990—DECIDED JULY 17, 1990

1A

Defendants' submission starts from the premise that the interaction of the statutory phrase "mixture or substance" with the distribution of LSD by the dose in a carrier creates a unique probability of surprise results. The premise may be unwarranted. The paper used to distribute LSD is light stuff, not the kind used to absorb ink. Chapman's 1,000 doses weighed about 0.16 ounces. More than 6,000 doses, even in blotter paper, weigh less than an ounce. Because the LSD in one dose weighs about 0.05 milligrams, the combination of LSD-plus-paper is about 110 times the weight of the LSD. The impregnated paper could be described as "0.9% LSD".[1] Gelatin carrying LSD could be described as "2.5% LSD", if the weight for gelatin given in *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987), is accurate.

This is by no means an unusual dilution rate for illegal drugs. Heroin sold on the street is 2% to 3% opiate and the rest filler. Jerome J. Platt, *Heroin Addiction: Theory, Research, and Treatment* 48-50 (1986). Sometimes the mixture is even more dilute, approaching the dilution rate for LSD in blotter paper. E.g., *United States v. Buggs*, No. 89-2130 (7th Cir. May 18, 1990), slip op. 4 (conviction for sale of 9.95 grams of 1.2% heroin). Heroin and crack cocaine, like LSD, are sold on the streets by the dose, although they are sold by weight higher in the distribu-tional chain. All of the "designer drugs" and many of the opiates are sold by the dose, often conveniently packaged in pills. The Sentencing Commission lists MDA, PCP, psilocin, psilocybin, methaqualone, phenmetrazine, and amphetamines (regular and meth-) along with LSD as

[1] The 1,000 doses in *Chapman* weighed 5.7 grams, or 0.0057 grams per dose. The 11,751 doses in *Marshall* weighed 113.32 grams, or 0.00964 grams per dose. Marshall apparently sold premium LSD; the forensic chemist concluded that his 11,751 squares of blotter paper contained 670.72 milligrams of LSD, or 0.057 mg per dose—14% more per dose than the Sentencing Commission's norm of 0.05 mg. The substance Marshall sold was 0.59% LSD; the substance the other three sold was 0.877% LSD.

drugs sold by the dose in very dilute form. 55 Fed. Reg. 19197 (May 8, 1990) (amending Application Note 11 to U.S.S.G. 2D1.1). Other drugs, such as dilaudid and dolaphine, are sold by the pill rather than weight, and it is safe to assume that all have far less than 100% active ingredients.

Just as it is hasty to assume that the carrier produces a unique dilution factor for LSD, so it is unwarranted to assume that LSD as it leaves the refinery is pure, and therefore weighs only 0.05 mg per dose. Solid LSD weighs that little, but is it shipped dry? Neither the record nor the sparse literature tells us. LSD is applied to a carrier in a solvent such as alcohol. How dilute is this solution? If we assume that one drop of liquid is applied to each square of blotter paper, then the liquid is only 0.1% LSD.[2] We do not know whether one drop per dose is right, but, if it is, the solution weighs 8.5 times as much per dose as blotter paper: a dose of LSD in alcohol weighs 0.0487 grams, while a dose of LSD in blotter paper weighs 0.0057 grams.[3] A manufacturer caught with wholesale quantities of LSD solution that had not been applied to blotter paper would face sentences *higher* than those who possess only the paper containing the drug.

So there may be nothing extraordinary about LSD, no reason to think that the statute operates differently for LSD than for heroin. Heroin comes into this country pure; it is sold diluted on the street, creating the possibility

[2] One drop is equivalent to one minim, or 0.06161 milliliters. That implies about 16,231 drops per liter. One liter of water weighs a kilogram. Ethyl alcohol has a specific gravity of 0.7893, so a liter of ethyl alcohol weighs 0.7893 kilograms. LSD weighs 0.05 mg per hit. So 16,231 doses of LSD weigh 0.811 grams. A liter of alcohol containing these doses weighs 790.11 grams (the 789.3 grams of alcohol plus the 0.811 grams of LSD). Thus the solution is 0.103% LSD.

[3] In *Chapman*, in which 1,000 doses weighed 5.7 grams. LSD dissolved in alcohol weighs only 5.05 times as much per dose as LSD in Marshall's heavier blotter paper (see note 1 above).

that §841 will require higher sentences for retailers than for smugglers or refiners. The dilution factor for retail heroin is not significantly different from the factor for LSD on blotter paper. LSD in solution weighs more than LSD on blotter paper; pure heroin weighs (much) less per dose than the dilute heroin sold on the street. Heroin is sold in different cities at different dilution rates; that implies that the weight of a packet of heroin for a single administration weighs more in some cities than in others. The percentage difference exceeds the gap between paper and gelatin, the common carriers of LSD. Office of Intelligence, Drug Enforcement Administration, *Domestic Monitor Program: Summary Report Fiscal Year 1989*. So although §841 creates the possibility of erratic application in LSD cases, it is important to recognize that the normal case involves neither extreme weight (LSD in orange juice) nor extreme purity (19,999 doses weighing less than a gram). With this understanding, we turn to the statute.

B

It is not possible to construe the words of §841 to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug. The statute speaks of "mixture or substance containing a detectable amount" of a drug. "Detectable amount" is the opposite of "pure"; the point of the statute is that the "mixture" is not to be converted to an equivalent amount of pure drug.

The structure of the statute reinforces this conclusion. The 10-year minimum applies to any person who possesses, with intent to distribute, "100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)", §841(b)(1)(A)(iv). Congress distinguished the pure drug from a "mixture or substance containing a detectable amount of" it. All drugs other than PCP are governed exclusively by the "mixture or substance" language. Even brute force cannot turn that language into a reference to pure LSD. Congress used the same "mixture or

substance" language to describe heroin, cocaine, amphetamines, and many other drugs that are sold after being cut—sometimes as much as LSD. There is no sound basis on which to treat the words "substance or mixture containing a detectable amount of", repeated verbatim for every drug mentioned in §841 except PCP, as *different* things for LSD and cocaine although the language is identical, while treating the "mixture or substance" language as meaning the *same* as the reference to pure PCP in 21 U.S.C. §841(b)(1)(A)(iv) and (B)(iv).

Although the "mixture or substance" language shows that the statute cannot be limited to pure LSD, it does not necessarily follow that blotter paper *is* a "mixture or substance containing" LSD. That phrase cannot include all "carriers". One gram of crystalline LSD in a heavy glass bottle is still only one gram of "statutory LSD". So is a gram of LSD being "carried" in a Boeing 747. How much mingling of the drug with something else is essential to form a "mixture or substance"? The legislative history is silent, but ordinary usage is indicative.

"Substance" may well refer to a chemical compound, or perhaps to a drug in a solvent. LSD does not react chemically with sugar, blotter paper, or gelatin, and none of these is a solvent. "Mixture" is more inclusive. Cocaine often is mixed with mannitol, quinine, or lactose. These white powders do not react, but it is common ground that a cocaine-mannitol mixture is a statutory "mixture".

LSD and blotter paper are not commingled in the same way as cocaine and lactose. What is the nature of their association? The possibility most favorable to defendants is that LSD sits on blotter paper as oil floats on water. Immiscible substances may fall outside the statutory definition of "mixture". The possibility does not assist defendants—not on this record, anyway. LSD is applied to paper in a solvent; after the solvent evaporates, a tiny quantity of LSD remains. Because the fibers absorb the alcohol, the LSD solidifies inside the paper rather than on it. You cannot pick a grain of LSD off the surface of

the paper. Ordinary parlance calls the paper containing tiny crystals of LSD a mixture.

United States v. Rose, 881 F.2d 386 (7th Cir. 1989), like every other appellate decision that has addressed the question,[4] concludes that the carrier medium for LSD, like the "cut" for heroin and cocaine, is a "mixture or substance containing a detectable amount" of the drug. Although a chemist might be able to offer evidence bearing on the question whether LSD and blotter paper "mix" any more fully than do oil and water, the record contains no such evidence. Without knowing more of the chemistry than this record reveals, we adhere to the unanimous conclusion of the other courts of appeals that blotter paper treated with LSD is a "mixture or substance containing a detectable quantity of" LSD.

C

Two reasons have been advanced to support a contrary conclusion: that statutes should be construed to avoid constitutional problems, and that some members of the sitting Congress are dissatisfied with basing penalties on the combined weight of LSD and carrier. Neither is persuasive.

A preference for giving statutes a constitutional meaning is a reason to construe, not to rewrite or "improve". E.g., *United States v. Monsanto*, 109 S. Ct. 2657, 2664 (1989); *United States v. Albertini*, 472 U.S. 675, 680 (1985).

[4] *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989); *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989); *United States v. Elrod*, 898 F.2d 60 (6th Cir. 1990); *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990); *United States v. Larsen*, 1990 U.S. App. LEXIS 8792 (10th Cir.). See also *United States v. Skelton*, 901 F.2d 1204, 1206 (4th Cir. 1990) (although "Congress has drawn a distinction between pure PCP and PCP mixtures, it has not drawn a like distinction with respect to PCPy or any other hallucinogen"; holding that the full weight of a PCPy mixture counts, even though PCPy is a close chemical relation to PCP); *Tennessee v. Elphee*, 1989 Tenn. Cr. App. LEXIS 163 at 9-10 (weight of blotter paper counted under state law identical to §841).

Canons are doubt-resolvers, useful when the language is ambiguous and "a construction of the statute is *fairly possible* by which the question may be avoided", *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (emphasis added). "[S]ubstance or mixture containing a detectable quantity" is not ambiguous, avoidance not "fairly possible". Neither the rule of lenity nor the preference for avoiding constitutional adjudication justifies disregarding unambiguous language.

The canon about avoiding constitutional decisions, in particular, must be used with care, for it is a closer cousin to invalidation than to interpretation. It is a way to enforce the constitutional penumbra, and therefore an aspect of constitutional law proper. Constitutional decisions breed penumbras, which multiply questions. Treating each as justification to construe laws out of existence too greatly enlarges the judicial power. And heroic "construction" is unnecessary, given our conclusion in Part III that Congress possesses the constitutional power to set penalties on the basis of gross weight.

As for the pending legislation: subsequent debates are not a ground for avoiding the import of enactments. E.g., *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733-34 & n.14 (1977); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). Although the views of a subsequent Congress are entitled to respect, ongoing debates do not represent the views of Congress. Judge Wilkins, Chairman of the Sentencing Commission, wrote a letter to Senator Biden, Chairman of the Judiciary Committee, remarking that "it is unclear whether Congress intended the carrier to be considered as a packaging material, or since it is commonly consumed along with the illicit drug, as a dilutent ingredient in the drug mixture". The Chairman of the Commission invited the Chairman of the Committee to introduce legislation choosing one or the other explicitly.

Senator Biden introduced an amendment to S. 1711, the Administration's omnibus drug bill, stating in materials read into the Congressional Record that the amendment

changes the statute to omit the weight of the carrier. 135 Cong. Rec. S 12748 (daily ed. Oct. 5, 1989). So far as we can determine, the language he actually introduced did not contain the text to which his prepared statement referred. No language of this kind appears in the version the Senate passed. 135 Cong. Rec. S 13433 (daily ed. Oct. 16, 1989) (text of bill that Senate sent to House). The House is yet to act. Senator Kennedy has introduced an amendment to other legislation affecting the criminal code, which, like Senator Biden's, would exclude the carrier. Amendment No. 1716 to S. 1970, 136 Cong. Rec. S 7069 (daily ed. May 24, 1990). But this proposal, too, awaits enactment. Both Senator Kennedy's proposal and Senator Biden's statement are more naturally understood as suggestions for change than as evidence of today's meaning. At all events, the Senators were speaking for themselves, not for Congress as an institution. See *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978).

Statements supporting proposals that have not been adopted do not inform our reading of the text an earlier Congress passed and the President signed, see *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 956 (1989). We may not, in the name of faithful interpretation of what the political branches *enacted*, treat as authoritative the statements of legislators supporting change. Opinion polls of Senators are not law. See *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988). See also *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

II

Only Brumm received a mandatory minimum sentence. Everyone else could have received the same sentence if all minima were excised from §841, and if the weights in the statute were read as referring to pure LSD rather than to LSD-plus-carrier. The sentences of Marshall (20 years), Chapman (8 years), and Schoenecker (63 months) are derived largely from the sentencing guidelines. Understandably, these defendants argue that whether or not

the statute counts the carrier medium, the quantity table in the guidelines does not.

This is not a strong argument. The guidelines speak of "mixture or substance", the statutory language. Footnote * to the quantity table at U.S.S.G. 2D1.1 says that "[u]nless otherwise specified, the weight of the controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Only PCP and methamphetamine are "otherwise specified". Application Note 9 reiterates that the footnote allows purity adjustments only for PCP and methamphetamine. Application Note 1 to §2D1.1 says that " 'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. §841." As we observed in *United States v. Pinto*, 875 F.2d 143 (7th Cir. 1989), and *United States v. White*, 888 F.2d 490 (7th Cir. 1989), these notes are taken seriously as contemporaneous explanations by the authors. To conclude that the carrier medium is a statutory "mixture or substance" is to conclude that its weight counts under the guidelines as well.

For what it is worth, the guidelines demonstrates the view of the Sentencing Commission that the statutory weights include dilutents and carriers. None of the references to purity in the guidelines makes sense if the weights in the statute deal with pure drugs to start with. The Commission's most recent words reinforce the conclusion that it understands both the statute and the guidelines to include the weight of the carrier medium for LSD. Recently the Commission transmitted to Congress a proposed amendment to U.S.S.G. 2D1.1 Application Note 11, the conversion table for cases in which only the number of doses is known. See 55 Fed. Reg. 19197 (May 8, 1990). This table gives LSD a weight of 0.05 mg per dose (20,000 doses per gram). The amendment specifies that the number of doses is not to be used to derive the weight of the "mixture or substance" if the actual weight is known, a caution necessary only if "mixture or substance" includes the carrier medium. Lest the smallest

That someone else's sentence might be disproportionate to their offenses is no reason for altering these defendants' punishments. Effects of statutes on strangers are in general not sufficient to prevent application to oneself (this is not a first amendment case), and in particular the claim that someone else may not be punished severely enough is not a good objection to one's own punishment. *Wayte v. United States*, 470 U.S. 598, 607-10 (1985); *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989). Prosecutors possess the power to excuse the big cheeses while landing on the small fry with hobnail boots. Discretion, even if it ends in grossly unequal treatment according to culpability, does not entitle a guilty defendant to avoid a sentence appropriate to his own crime. So too when the possibility may be attributed to the statute rather than (or in addition) to prosecutorial choice. See *United States v. Batchelder*, 442 U.S. 114, 124-26 (1979), holding that it does not violate the due process clause to enact two statutes providing different penalties for identical conduct—the mirror image of the claim in this case that the statutes do too little to impose graduated penalties for different conduct.

Until this century Congress did not attempt to differentiate sentences according to culpability, and it did not authorize judges to do so. Statutes often set out flat penalties for specified crimes, such as the sanction of 25 years' imprisonment for armed robbery of a postal carrier, 18 U.S.C. §2114 (repealed in 1984), a term impervious to such variables as the amount taken and the use of violence. Courts thought identical (and severe) treatment of greatly different offenses constitutional. E.g., *United States v. Smith*, 602 F.2d 834 (8th Cir. 1979); *Smith v. United States*, 284 F.2d 789, 791 (5th Cir. 1960). We recounted the history briefly in *Pinto*, in the course of holding that the sentencing guidelines do not violate the due process clause by diminishing sentencing judges' discretion to tailor sentences closely to offense and offender.

Pinto rests on a conclusion that the due process clause allows Congress to write with broad strokes, recognizing that there will be a poor fit between the statutory elements of the offense and the sentence attached to them if other important factors are left out. (Here the omitted factor is the purity of the "mixture or substance".) Every other court of appeals has agreed with *Pinto*.[7] Judges, who in the era between the end of uniform penalties and the creation of the guidelines had discretion to impose such sentences as pleased them, also may create disparity. Some judges thought wholesalers the principal threat; some were offended by retailers; some thought young criminals especially deserving of punishment; others excused women when men would have received high sentences for identical conduct. It was this crazy-quilt of incompatible yet unreviewable sentences, *Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974), that the 1984 code and the guidelines were designed to replace. No one supposes, however, that the pre-guideline practice was unconstitutional, even though the potential for disparity had been realized.

Neither uniform sentences that disregard characteristics of offense and offender, nor sentences so thoroughly discretionary that they are not comparable from one judge to another, violate the due process clause. Both systems have been tried in the United States and deemed constitutional. If they are constitutional, so is §841. Maybe Congress ought to make the statute books more rational.

[7] *United States v. Fox*, 889 F.2d 357 (1st Cir. 1989); *United States v. Vizcaino*, 870 F.2d 52 (2d Cir. 1989); *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988); *United States v. Bolding*, 876 F.2d 21 (4th Cir. 1989); *United States v. White*, 869 F.2d 822 (5th Cir. 1989); *United States v. Allen*, 873 F.2d 963 (6th Cir. 1989); *United States v. Brittman*, 872 F.2d 827 (8th Cir. 1989); *United States v. Brady*, 895 F.2d 538 (9th Cir. 1990); *United States v. Thomas*, 884 F.2d 540 (10th Cir. 1989); *United States v. Erves*, 880 F.2d 376 (11th Cir. 1989); *United States v. Lafayette*, 1990 U.S. App. LEXIS 2979 (D.C. Cir.).

ambiguity remain, the Commission puts an asterisk after LSD and adds (emphasis added): "[T]he weight per unit shown is the weight of the actual controlled substance, *and not generally the weight of the mixture or substance containing the controlled substance.* Therefore, use of this table provides a very conservative estimate of the total weight." Couldn't be clearer that the Sentencing Commission believes that the weight of the carrier is part of the total "mixture or substance" under both the statute and the guidelines.

III

A constitutional question remains, given our construction of the statute and guidelines. The provision of the Constitution reading on sentences is the eighth amendment, forbidding the infliction of "cruel and unusual punishment". Marshall, alone among the four defendants, invokes the eighth amendment. It offers weak support at best. *Hutto v. Davis*, 454 U.S. 370 (1984), holds that 40 years is not constitutionally excessive for distributing nine ounces of marijuana. Marshall got 20 for a more serious crime. Many federal courts have held that sentences in this range may be imposed for selling similar volumes of LSD.[5] Other courts have sustained life without parole for drug offenses.[6] LSD causes psychoses, sometimes leading to suicide or violent aggression. Terrence C. Cox, Michael R. Jacobs, A. Eugene LeBlanc & Joan A. Marshman, *Drugs and Drug Abuse: A Reference Text* 311-15 (1983);

[5] Including our own opinion in *Rose*, which held that five years for 472 doses of LSD is consistent with the eighth amendment. See also, e.g., *Bishop* (151 months permissible for possession of 3500 doses).

[6] *Michigan v. Harmelin*, 176 Mich. App. 525, 440 N.W.2d 75 (1989), cert. granted, No. 89-7272 (May 29, 1990) (less than one kilogram of cocaine); *United States v. Aiello*, 864 F.2d 257 (2d Cir. 1988); *Terreborne v. Butler*, 848 F.2d 500 (5th Cir. 1988) (in banc); *United States v. Stewart*, 820 F.2d 1107 (9th Cir. 1987) (Kennedy, J.).

Albert Hofmann, *LSD: My Problem Child* 67-73 (1979). Society believes that the sale of hallucinogens is a serious crime, and severe sentences constitutionally may attend the crimes troubling to the people. *Rummel v. Estelle*, 445 U.S. 263 (1980); *United States v. Sanchez*, 859 F.2d 483 (7th Cir. 1988); *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985).

A

Although these defendants received sentences within the limits set by the eighth amendment—the provision of the Bill of Rights expressly addressed to quantum of punishment—they insist that their sentences are unconstitutional under the due process clause of the fifth amendment. Yet defendants received ample "process". Their complaint is about substance, not process. Substantive due process, a judicial invention, is least applicable when a provision of the Constitution directly addresses the subject. *Graham v. Connor*, 109 S. Ct. 1865 (1989) (substantive due process is not an appropriate way to analyze excessive force in arrests, given the fourth amendment); see also *Chicago Board of Realtors, Inc. v. Chicago*, 819 F.2d 732, 742-45 (7th Cir. 1987); *United States v. Miller*, 891 F.2d 1265, 1271-73 (7th Cir. 1989) (concurring opinion). This is not an appropriate case for the deployment of that elusive doctrine.

Defendants' arguments are not so much about the sentences handed out for LSD in blotter paper as they are objections to the possibility that other persons will receive sentences much too long (LSD in orange juice) or too short (19,999 doses in pure form). But these are only possibilities, which have nothing to do with these sentences. *Defendants'* sentences bear rational relations to *their* offenses. That is all the Constitution requires, unless criminal defendants are entitled to assert third parties' rights to better sentencing practices—which they are not. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984); *United States v. Raines*, 362 U.S. 17, 21 (1960).

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would not draw a *mandatory* minimum is of no moment. He could and likely would get the 20 years per count authorized by §841(b)(1)(C), and probably there would be more than one count. A manufacturer or wholesaler will be involved in a conspiracy, the sentence for which may be tacked on to the sentence for the amount possessed or sold.

That is not the half of it. The *real* punishment for a manufacturer or a major wholesaler of any drug is not set by §841. It is set by the Continuing Criminal Enterprise statute, 21 U.S.C. §848. This law, "a carefully crafted prohibition . . . designed to reach the 'top brass' in the drug rings", *Garrett v. United States*, 471 U.S. 773, 781 (1985), comes into play whenever a person organizes or supervises a criminal enterprise, involving at least five others, from which he earns substantial income. Major distributors fall within the statute, *United States v. Bond*, 847 F.2d 1233 (7th Cir. 1988), as do those who aid and abet the drug chieftains, *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (in banc). Persons who escape the jaws of §841 walk into the maw of §848. The CCE offense carries a minimum term of 20 years' imprisonment. If the defendant is "the principal administrator" and the enterprise has gross receipts of $10 million per year, the mandatory penalty is life without parole, 21 U.S.C. §848(b). There is in theory little risk, and in practice none, that the major players in the manufacture and distribution of LSD or any other illegal drug will be treated lightly compared with the four middlemen now before us. Defendants might have established that, despite all appearances, sentences are unrelated (or inversely related) to the amount of pure LSD involved. Yet they introduced no evidence to this effect, and none has been published in the social science literature. Persons who want a court to hold a statute unconstitutional need to do more than speculate. *Odgen v. Saunders*, 25 U.S. (12 Wheat.) 212, 270 (1827) (opinion of Washington, J.).

Although the parties say that Congress legislated in ignorance, we lack support for that belief. Congress itself

says the opposite, that it selected the weights in the table "after consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs". H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 11 (1986). Agents and prosecutors are well-acquainted with the effects of different drugs and the details of their distribution. The numbers in §841 are not hat sizes. Yet even if we attribute unfamiliarity to Congress, we must recognize our own innocence of data. We do not know whether LSD leaves the factory (a) pure and dry, (b) on blotter paper, or (c) dissolved in alcohol (and, if in solution, at what rate of dilution). The range of weights per dose spans at least three orders of magnitude (see notes 1-3 above). If LSD is shipped in solution, then the higher-ups draw longer sentences per dose than do retailers; if shipped in blotter paper the sentences are the same per dose. We do not know the extent to which blotter paper dominates retail sales; if it holds the lion's share, then the risk of erratic sentences at the retail tier is small. We do not know the actual distribution of sentences. For all we can tell, sentences in LSD cases come *closer* to a smooth upward graduation per dose than do sentences for cocaine and heroin.[9] Lacking these facts, we are in

[9] Judge Posner's dissenting opinion contends that the number of doses of LSD accounts for only 16% to 23% of the variance in sentences. This is a hypothetical calculation; data about the lengths of actual sentences (which we do not possess) may put things in better light, or may show that the correlation for LSD is no worse than that for other drugs. Judge Posner's hypothetical cases include many in which LSD is distributed on sugar cubes. Sugar cubes are so heavy compared to blotter paper that one might as well examine the effect on sentences of distributing LSD in bricks. If you remove the sugar cube hypotheticals from Judge Posner's sample (a plausible step, since there has not been even one sugar cube prosecution under §841), the number of doses then explains 59.6% of the variance in sentences.

Contrast heroin, which is sold pure at wholesale and diluted at retail. Assume an average purity in retail sales of 2.5%, and 100% purity in wholesale sales. Assume also that the heroin is sold at

(Footnote continued on following page)

Maybe it ought to specify that the sentence increases as a function of the net rather than the gross weight of the drug, but the task of determining how close to make the fit between offense and sentence is legislative.

B

Cases such as *McCleskey v. Kemp*, 481 U.S. 279, 306-08 (1987), hold open the possibility of a constitutional objection under equal protection criteria when the punishment bears no relation whatever to the crime. See also *Marshall v. United States*, 414 U.S. 417 (1974), holding that statutory limits on eligibility for low sentences may be examined, although only under the highly deferential rational basis test. Let us ask, then, whether the pattern of sentences under the drug laws is cockeyed. Other courts do not think so; they have uniformly rebuffed constitutional challenges to statutes that make punishment depend on gross rather than net weight.[8]

[8] E.g., *United States v. Whitehead*, 849 F.2d 849, 858-60 & n.26 (4th Cir. 1988); *United States v. Baker*, 883 F.2d 13 (5th Cir. 1989); *United States v. Mendoza*, 876 F.2d 639, 641 (8th Cir. 1989); *Bishop*, *supra* note 4, 894 F.2d at 987; *United States v. Savinovich*, 845 F.2d 834 (9th Cir. 1988); *United States v. Holmes*, 838 F.2d 1175 (11th Cir. 1988). See also *United States v. Bayerle*, 898 F.2d 28, 31-32 (4th Cir. 1990) (rejecting a constitutional challenge to the application of the weight tables to dilaudid, which like LSD is sold by the dose in dilute form). State cases to the same effect include *Michigan v. Campbell*, 320 N.W.2d 381, 382-83 (Mich. App. 1982); *Traylor v. Delaware*, 458 A.2d 1170, 1176-77 (Del. 1983); *Florida v. Yu*, 400 So. 2d 762 (Fla. 1981); *Illinois v. Mayberry*, 345 N.E.2d 97 (Ill. 1976); see also *Danell v. Henderson*, 501 F.2d 1180 (2d Cir. 1974) (New York law). Cf. *United States v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir. 1987) (Congress need not rank offenses by severity when designing penalties); *United States v. Buckner*, 894 F.2d 975, 980-81 (8th Cir. 1990) (§841's treatment of one gram of cocaine base (crack) as equivalent to 100 grams of cocaine does not violate substantive due process); *United States v. Thornton*, 901 F.2d 738 (9th Cir. 1990) (enhancement provided by §845a for sales within 1,000 feet of a school is rational as applied to sales that have no connection to school or school children).

Both the statute and the guidelines make the sentence increase with quantity. The greater the quantity, the greater the sentence. This is a rational way to proceed. Whether the potential created by failure to adjust for purity will be realized depends not only on the range of purity that actually occurs but also on what can be done about the extreme cases. Do we see major suppliers of LSD skipping out the courthouse door because their pure drug falls outside the mandatory minima, and the catch-all statute (§841(b)(1)(C)) does not allow judges to craft sentences appropriate to their crimes? Do we see people going to jail for ten years because they sold one dose of LSD in a soft drink? If we don't, then the potential for disparity does not require holding statute and guidelines unconstitutional.

We do not see an inverted system of penalties. Counsel have not called to our attention, and we could not find, even one prosecution for selling a single dose of LSD, let alone a single-dose prosecution that ended in a preposterously high sentence. In the broad middle ground of retail and wholesale sales, in which (to judge from recent decisions) LSD almost always is sold in blotter paper, §841 and the guidelines work as they should: the more doses, the greater the weight; the greater the weight, the longer the sentence. Marshall, wholesaler of 11,751 doses, gets 20 years; the other three defendants, retailers of 1,000, get five to eight years. As for the high end: any manufacturer or wholesaler who is in the business in a big way will trigger either §841(b)(1)(A)(v) {10 years to life for 10 grams or more of LSD} or §841(b)(1)(B)(v) {5 to 40 years for 1 gram or more of LSD}. A person who cannot be linked to even one gram is not such a big fish after all.

Even a "minor manufacturer" is covered by §841(b)(1)(C), which authorizes a maximum sentence of 20 years without parole. Although this subsection lacks a mandatory minimum, this is irrelevant to the sentence. Minimum sentences are designed for little fish, the ones judges would throw back if the legislature would let them. That a manufacturer caught with less than a gram of pure LSD

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a difference? No one has been prosecuted for distributing LSD in sugar cubes in the last 20 years. Similarly, no one has been prosecuted for possessing significant quantities of pure LSD in the last decade. Why worry about how to treat manufacturers caught red-handed with pure dry LSD if they are never nabbed? Statutes rationally may be addressed to the main cases rather than the exceptions. Congress may count on prosecutorial discretion to take care of the absurd cases (one dose in a quart of lemonade), and it has created the CCE Act to take care of Mr. Big. It need not build into each *section* of the United States Code an apparatus sufficient in itself to produce graduated penalties.

Third, extracting LSD from blotter paper and weighing the drug *accurately* may be difficult. One dose is an exceedingly small quantity of pure LSD. Counsel suggested at oral argument that it takes a specialist in gas chromatography[10] to extract the drug, and that this is done only for samples rather than the defendant's entire supply. Figures reported in the cases (including this one) are extrapolations from samples, not actual weights. Congress rationally may decide to avoid a costly and imprecise process.

Although nothing in the legislative history suggests that Congress went through such a process of reasoning, it need not. Judges assess the validity of legislative decisions; we do not assign grades to legislative deliberations. The Supreme Court tells us that it is enough that a rational basis may be hypothesized, *Vance v. Bradley*, 440 U.S. 93, 110-12 (1979); *Northside Sanitary Landfill, Inc. v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990) (collecting other cases), whether or not the legislature acted on it. Even laws that resulted from mistakes in the drafting process or ignorance in the halls of Congress survive if a

[10] So counsel said; more likely a gas chromatograph tells you *whether* LSD is present without verifying the amount. It may take a gas centrifuge to extract and re-purify the drug, and it is very difficult and costly to run a sophisticated gas centrifuge.

rational basis may be supplied for the result. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977).

E

What remains is concern that the statute and guidelines discriminate among retailers. Those who distribute LSD in sugar cubes generate higher gross weights (and thus higher sentences) than those who distribute on blotter paper. Some kinds of paper are heavier than others and so yield higher sentences. To say that the difference in weight between sugar and paper (or between brands of paper) condemns the rules with respect to LSD is to damn the rules concerning heroin, cocaine, and all other drugs too. Anyway, these defendants sold LSD on blotter paper and as beneficiaries of any difference in sentencing (compared with sugar cubes) they are in no position to complain. 12A

Any distributor concerned that sugar cubes weigh more than small squares of paper may reduce his exposure by choosing the lightest brand of paper as a medium. Blotter paper seems to be the norm these days. There have been no reported federal prosecutions in 20 years for distributing LSD in sugar cubes, and no state prosecutions in 17 (Michigan, in 1973, is the most recent, see *People v. Urban*, 45 Mich. App. 255, 206 N.W.2d 511 (1973)); to hold a law unconstitutional out of concern about something that has not happened in a generation is not sensible. More: Distributors pick their poison. The penalties are plain for all to see. They decide what drug to peddle, on what medium. Marshall liked the cost-benefit ratio for LSD, including its penalty, more than the cost-benefit ratio for cocaine. Perhaps the amount of crack cocaine leading to a 20 year term causes more social harm than the level of LSD that draws this sentence, but a court would not dream of requiring the weight ratios among LSD, heroin, and cocaine to reflect their "true dangerousness". No more should the court involve itself with the

no position to condemn this act of Congress as arbitrary in operation. Section 841 may work sensibly in practice and so is capable of constitutional application. E.g., *Caplin & Drysdale v. United States*, 109 S. Ct. 2646, 2657 (1989); *Wheat v. United States*, 486 U.S. 153, 163 (1988); *Salerno*, 481 U.S. at 745. Condemning a statute on the basis of a problem that may not exist is an inappropriate use of judicial power. *Schall*, 467 U.S. at 269 n.18; *Raines*, 362 U.S. at 21.

C

The sentencing guidelines do not prevent judges from matching punishment to gravity of offense. The guidelines do nothing to mitigate the lengthy sentences to which the main suppliers are exposed under the CCE act. Nor do they require manufacturers to be treated like retailers even if §841 is considered in isolation. Higher-ups receive increases under U.S.S.G. 3B1.1. Departures may follow hard on the increases. The "heartland" of the drug guidelines is distribution of dilute mixtures. Unrepresentative crimes lead to departures. Application Note 9 to U.S.S.G. 2D1.1 makes this clear in saying that "unusually high purity" of a drug may be the basis for upward departure. So sources may be treated in accord with their real culpability, even while the range in the table governs the ilute LSD usually recovered on the street. *United States v. Baker*, 883 F.2d 13, 15 (5th Cir. 1989); *United States v. Diaz-Villafane*, 874 F.2d 43, 51 (1st Cir. 1989).

The possibility of departures in either direction ensures the constitutionality of the guidelines. *United States v. Savage*, 888 F.2d 528, 529 (7th Cir.), rehearing denied, 894

[9] *continued*
retail purity in half of the cases. In this simple model, using the median guideline range, criminal history level I, for quantities from 1 gram to 50 kilograms, the quantity of pure heroin explains only 45% of the variance in sentences. LSD does not come off the worse for the comparison.

F.2d 1495 (1989); *United States v. Thomas*, 884 F.2d 540, 542-43 (10th Cir. 1989); *United States v. Allen*, 873 F.2d 963, 966 (6th Cir. 1989). If the LSD is extraordinarily dilute, say in rum and Coca-Cola rather than blotter paper, the judge may depart downward, just as the judge may go up for special purity. Such escape hatches ensure sufficient flexibility to comply with any proportionality requirement in the Constitution. Only the mandatory minimum sentences bind. The Federal Courts Study Committee recommends that these be repealed, *Report of the Federal Courts Study Committee* 133-34 (1990), but this is legislative rather than judicial business.

D

Although sentences under §§ 841, 846, and 848 together may be proportional to the number of doses sold, it would not matter if they were not. All Congress needs is a rational basis for making the penalties depend on gross rather than net weight. There are at least three. 11A

First, LSD is sold at retail for a low price (a few dollars per dose). Blotter paper apparently has contributed to the renewed success of the drug, making it easy to transport, store, conceal, and sell. Because the carrier medium is an ingredient in the drug distribution business, it is rational to design a schedule of penalties based on that tool of the trade. Congress might choose to penalize drug smugglers according to the value of the property they use rather than the number of doses they distribute. The portions of the statute requiring the forfeiture of property used in connection with the sale of an illegal drug do exactly this, penalizing peddlers without regard to the volume of sales. Similarly, it is rational to make the penalty depend on a carrier that is essential to successful distribution of the drug.

Second, extracting the "pure" drug and debating whether that task has been done properly is unnecessary if, in 99% of all cases, LSD is sold in blotter paper. Why reduce the amount to a pure measure if that almost never spells

details of dilution ratios and carrier mediums. Retailers who select sugar rather than blotter paper on which to sell LSD must accept their fate.

Political decisions may be harsh yet within the bounds of power. The Constitution does not compel Congress to adopt a criminal code with all possibility for unjust variation extirpated. Experience with the guidelines suggests the reverse: Every attempt to make the system of sentences "more rational" carries costs and concealed irrationalities, both loopholes and unanticipated severity. Criminals have neither a moral nor a constitutional claim to equal or entirely proportional treatment. Constitutional law is not a device allowing judges to set the "just price" of crime, to prescribe the ratio of retailers' to manufacturers' sentences. That Congress could have written better laws does not mean that it had to. *United States v. Powell*, 423 U.S. 87 (1975). Amendments to the criminal code may be in order, but they are not ours to make under the banner of constitutional adjudication.

IV

Remaining objections to Marshall's sentence may be dealt with briefly. The district judge increased Marshall's offense level by two on concluding that Marshall was "an organizer, leader, manager, or supervisor" of the LSD distribution network. U.S.S.G. 3B1.1(c). Evidence that Marshall saturated the blotter paper with the LSD solution and sold it wholesale supports the district judge's finding that Marshall was organizing its distribution. Once the judge passes on contested issues of fact, or application of law to fact, our review is deferential. 18 U.S.C. §3742(e), as amended and renumbered by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690; *White*, 888 F.2d at 495; *United States v. Wright*, 873 F.2d 437, 443-44 (1st Cir. 1989) (Breyer, J.); *United States v. Mejia-Orosco*, 868 F.2d 807 (5th Cir. 1989). The conclusion that Marshall was an organizer is not clearly erroneous.

Marshall's other arguments all concern reasons for believing that the judge should have given him a sentence lower than the guideline range. His request was addressed to the district judge's discretion. We lack jurisdiction to review the court's decision to impose a sentence within the range. *United States v. Franz*, 886 F.2d 973 (7th Cir. 1989). Marshall's appeal is dismissed for want of jurisdiction to the extent he asks us to direct the district judge to depart downward. In all other respects the judgments under review are

AFFIRMED.

CUMMINGS, *Circuit Judge*, with whom BAUER, *Chief Judge*, and WOOD, JR., CUDAHY, and POSNER, *Circuit Judges*, join, dissenting:

Two assumptions lie at the heart of the majority opinion. The first is that the words "mixture or substance" are not ambiguous and are not therefore susceptible of interpretation by the courts. The second is that the due process clause of the Fifth Amendment guarantees process but not substance. Both of these assumptions are unwarranted.

Six courts, including the district court in *Marshall*, have explicitly considered whether the carrier in an LSD case is a mixture or substance within the meaning of 21 U.S.C. § 841.[1] Five of these courts have concluded that the blotter paper is a "mixture or substance" within the meaning of the statute. *United States v. Larsen*, Nos. 89-8031,

[1] A seventh court, the Court of Appeals for the Fourth Circuit, has also held that the weight of the blotter paper should be included for sentencing purposes. As in this Circuit's decision in *United States v. Rose*, 881 F.2d 386, 388 (1989), however, the Fourth Circuit decision did not turn on whether the paper is properly considered a "mixture or substance" since the defendant conceded that point. *United States v. Daly*, 883 F.2d 313, 317 (4th Cir. 1989).

89-8032 (10th Cir. June 4, 1990), 1990 U.S. App. LEXIS 8792; *United States v. Elrod*, 898 F.2d 60 (6th Cir. 1989); *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990); *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989); *United States v. Marshall*, 706 F. Supp. 650, 653 (C.D. Ill. 1989). These courts rely primarily on the 1986 amendments to Section 841, which altered the references to various drugs, including LSD, by adding the words "mixture or substance containing a detectable amount of [the drug in question]." The earlier version of the statute referred merely to the drugs themselves. See *United States v. McGeehan*, 824 F.2d 677 (8th Cir. 1987) (weight of carrier medium excluded from sentencing calculation under pre-amendment version of 21 U.S.C. § 841), certiorari denied *sub nom. Jovanovich v. United States*, 484 U.S. 1061.

The sixth court, the United States District Court for the District of Columbia, held that blotter paper was not a mixture or substance within the meaning of the statute. *United States v. Healy*, 729 F. Supp. 140 (D.D.C. 1990). The court relied not only on ordinary dictionary definitions of the words mixture and substance but also on a November 30, 1988, Sentencing Commission publication, entitled "Questions Most Frequently Asked About the Sentencing Guidelines," which states that the Commission has not taken a position on whether the blotter paper should be weighed. The conclusion that the Commission has not yet resolved this question is further supported by a Sentencing Commission Notice issued on March 3, 1989, which requested public comments on whether the Commission should exclude the weight of the carrier for sentencing purposes in LSD cases.[2]

[2] The Commission has recently adopted several amendments and sent them to Congress for approval. Among these is an amendment to Application Note 11 to Guidelines Section 2D1.1. This amendment specifically states that the typical weight per dose of LSD that is given in the Weight Per Dose Table as .05 milligrams is the weight of the LSD alone and not of the LSD combined with

(Footnote continued on following page)

The *Healy* court also stated that Congress could have intended the words "mixture or substance" to refer to the liquid in which the pure LSD is dissolved. *Id.* Finally, the *Healy* court relied on a Guidelines table designed to provide a sentencing court with an equivalent weight for sentencing purposes in cases in which the number of doses distributed is known but the actual weight is unknown. The table provides that a dose of LSD weighs .05 milligrams. Guidelines § 2D1.1, Commentary, Drug Equivalency Tables. This weight closely approximates the weight of one dose of LSD without blotter paper, but is not an accurate reflection of one dose with blotter paper.[3]

The court in *Healy* did not refer to the legislative history of the statute to support the proposition that Congress did not intend the weight of the carrier to be included in LSD cases. This is not surprising since the only reference to LSD in the debates preceding the passage of the 1986 amendments to Section 841 was a passing reference that does not address quantities or weights of drugs. 132 Cong. Rec. S14270 (daily ed. Sept. 30, 1986) (statement of Sen. Harken).

[2] *continued*
any carrier. 55 Fed. Reg. 19197 (May 8, 1990). A recent reference to this amendment in the BNA Criminal Practice Manual incorrectly suggests that the amendment seeks to permit an adjustment to a sentence for an LSD conviction if the combined weights of the carrier and the LSD "grossly exaggerate" the sentence. BNA Criminal Practice Manual, Vol. 4, No. 11 at 249. In spite of this apparent misapprehension by the BNA, the Commission has not, as yet, taken a position on whether the weight of the blotter paper should be included for the purpose of calculating a sentence in an LSD case.

[3] For example, in *Marshall* the parties stipulated that the defendant sold 11,751 doses of LSD. As previously noted, the total weight of these doses including the blotter paper was 113.329 milligrams. Thus if the blotter paper is included the weight of one dose would be 9.64 milligrams. On the other hand the weight of the LSD without the blotter paper in *Marshall* was 670.72 milligrams, and the weight of one dose if the blotter paper is not included is .057 milligrams.

Comments in more recent issues of the Congressional Record indicate that S. 1711 is not expected to pass the House of Representatives. See 136 Cong. Rec. S943 (daily ed. Feb. 7, 1990). In the meantime, however, a second attempt to clarify Congress' intent in amending 21 U.S.C. § 841 to include the words mixture or substance has now been introduced in the Senate. On April 18, 1990, Senator Kennedy introduced an amendment to S. 1970 (a bill establishing constitutional procedures for the imposition of the death penalty) seeking to clarify the language of 21 U.S.C. § 841. That amendment, Amendment No. 1716, states:

> Section 841(b)(1) of title 21, United States Code, is amended by inserting the following new subsection at the end thereof:
>
> "(E) In determining the weight of a 'mixture or substance' under this section, the court shall not include the weight of the carrier upon which the controlled substance is placed, or by which it is transported."

136 Cong. Rec. S7069 (daily ed. May 24, 1990).

To be sure there are difficulties inherent in relying heavily on this subsequent legislative history. The first is that these initiatives to clarify the manner in which 21 U.S.C. § 841 and the sentencing guidelines treat LSD offenders may never be enacted. The second is that a given amendment may be viewed not as a clarification of Congress' original intent, but as the expression of an entirely new intent. At the very least, however, this subsequent legislative history, coupled with the fact that the Sentencing Commission has yet to resolve its position on the matter, refutes the proposition that the language of the statute and the Guidelines "couldn't be clearer."

It was established at oral argument that when illegal drugs are sold in capsules, the weight of the capsule is not included in calculating the total weight of the drugs for charging or sentencing purposes. See *Davis v. United States*, 279 F.2d 576, 578 (4th Cir. 1960); *Thomas v. United States*, 239 F.2d 7, 8 (10th Cir. 1956) (weight of heroin sold in both cases excludes the weight of the capsule containing the heroin). Capsules are made of gelatin, Webster's Medical Desk Dictionary 97 (1986); Dorland's Illustrated Medical Dictionary 226 (23d ed. 1957), and yet their weight is not included. But the majority holds that when LSD is sold on gelatin the weight of the gelatin is included. Thus, apparently some gelatin is part of a "mixture or substance" and some is not. Does the determination depend on the shape into which the gelatin has been formed or on some other criterion? Would the gelatin be a part of the mixture or substance in an LSD case if a defendant sprayed an LSD-alcohol solution into a capsule, but not if a grain of LSD were placed into the capsule with a tweezers? It is not enough to say that "ordinary usage" precludes including the weight of a heavy glass bottle or a Boeing 747. The words "mixture or substance" are ambiguous, and a construction of those words that can avoid invalidation on constitutional grounds is therefore appropriate. See, *e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575; *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780; *Crowell v. Benson*, 285 U.S. 22, 62; *Murray v. The Charming Betsy*, 2 Cranch 64, 118.

Even if such a construction is wrong, however, and Congress did intend to include the weight of various carrier media in the weight calculation in LSD cases, the defendants should still prevail, since such inclusion would violate the defendants' Fifth Amendment right to due process of law. The Fifth Amendment prohibits the government from engaging in discrimination that is so unjustified that it violates due process of law. *Rostker v. Goldberg*, 453 U.S. 57. The defendants in these cases do not complain that they have been treated differently from individuals convicted of distributing other drugs, or differently from individuals convicted of distributing drugs in other places. Hence the equal protection holding in *Rose* and the deci-

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Two subsequent pieces of legislative history, however, do shed some light on this question.[4] In a letter to Senator Joseph R. Biden, Jr., dated April 26, 1989 (Marshall Appendix at 165), the Chairman of the Sentencing Commission, William W. Wilkens, Jr., noted the ambiguity in the statute as it is currently written:

> With respect to LSD, it is unclear whether Congress intended the carrier to be considered as a packaging material, or, since it is commonly consumed along with the illicit drug, as a dilutant ingredient in the drug mixture * * *. The Commission suggests that Congress may wish to further consider the LSD carrier issue in order to clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture for punishment purposes.

Presumably acting in response to this query, Senator Biden added to the Congressional Record for October 5, 1989, an analysis of one of a series of technical corrections to 21 U.S.C. § 841 that were under consideration by the Senate that day. This analysis states that the purpose of the particular correction at issue was to remove an unintended "inequity" from Section 841 caused by the decisions of some courts to include the weight of the blotter paper for sentencing purposes in LSD cases. Accord-ng to Senator Biden, the correction "remedie[d] this inequity by removing the weight of the carrier from the calculation of the weight of the mixture or substance."[5]

[4] The Supreme Court has discussed the limitations of the use of subsequent legislative history in interpreting enacted legislation, but has declined to hold that subsequent legislative history is not entitled to any weight. Compare *Sullivan v. Finkelstein*, 58 U.S.L.W. 4827, 4830 n.8 (U.S. June 8, 1990) (No. 89-504), with *id.* at 4830-4831 (Scalia, J., concurring in part).

[5] The complete text of the relevant portions of Senator Biden's supplementary analysis of Amendment No. 976 is as follows:

(Footnote continued on following page)

This correction was adopted as part of Amendment No. 976 to S. 1711. 135 Cong. Rec. S12749 (daily ed. Oct. 5, 1989). The amended bill was passed by a unanimous vote of the Senate (*id.* at S12765) and is currently pending before the House.[6]

[5] *continued*

> Section 67 contains two amendments to the drug trafficking penalties in 21 U.S.C. § 841. The first amendment merely corrects a typographical error in section 6470(g) of the Anti-Drug Abuse Act of 1988.
>
> The second amendment responds to an inequity discussed in several recent cases involving LSD. See, *e.g.*, *United States v. Bishop*, 704 F. Supp. 910 (N.D. Iowa 1989). In these cases the courts determined that the weight of carriers such as sugar cubes, gelatin cubes, and blotter paper used to transport and consume substances such as LSD should be counted in determining whether the weight of the "mixture or substance" was sufficient to trigger a mandatory minimum penalty.
>
> The inequity in these decisions is apparent in the following example. A single dose of LSD weighs approximately .05 mg. The sugar cube on which the dose may be dropped for purposes of ingestion and transportation, however, weighs approximately 2 grams. Under 21 U.S.C. § 841(b) a person distributing more than one gram of a "mixture or substance" containing LSD is punishable by a minimum sentence of 5 years and a maximum sentence of 40 years. A person distributing less than a gram of LSD, however, is subject only to a maximum sentence of 20 years. Thus a person distributing 1,000 doses of LSD in liquid form is subject to no minimum penalty, while a person handing another person a single dose on a sugar cube is subject to the mandatory five year penalty.
>
> The amendment remedies this inequity by removing the weight of the carrier from the calculation of the weight of the mixture or substance.

135 Cong. Rec. S12748 (daily ed. Oct. 5, 1989).

[6] Although the record indicates that Amendment No. 976 was passed in its entirety, the final version of S. 1711 as reproduced in the Congressional Record of October 16, 1989, does not appear to contain the relevant portion of the amendment.

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statutory scheme, and at a weight per dose of .05 milligrams, such a major dealer would be able to possess up to 20,000 doses of LSD in granular form without subjecting himself to the mandatory five-year minimum penalty of 21 U.S.C. § 841(b)(1)(A)(v). A statute that produces such a result and yet purports to punish major participants more severely cannot survive even the limited scrutiny of rational basis review.

Cases in which the Supreme Court has applied rational basis review and found a statute unconstitutional are few, but there are some. As the Supreme Court recently reiterated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438, "the rational basis standard is 'not a toothless one.' " (citations omitted). In *Logan*, a majority of the Court agreed that an employment discrimination claim deadline violated the plaintiff's right to equal protection because it was not rationally related to the stated goals of expediting legitimate claims and discouraging unfounded claims. 455 U.S. at 438-442 (separate opinion of Blackmun, J., joined by Brennan, J., Marshall, J., and O'Connor, J.), 455 U.S. at 443-444 (concurring opinion of Powell, J., joined by Rehnquist, J.). See also *Jimenez v. Weinberger*, 417 U.S. 628; *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528; *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 501 (all finding statutes unconstitutional under rational basis review).

The majority has decided that ambiguous language is clear and that rational basis review is toothless. I therefore respectfully dissent.

POSNER, *Circuit Judge*, joined by BAUER, *Chief Judge*, and CUMMINGS, WOOD, JR., and CUDAHY, *Circuit Judges*, dissenting. In each of these cases consolidated for decision en banc (and in a third that is awaiting decision, *United States v. Dean*, No. 89-2786), the district court sentenced sellers of LSD in accordance with an interpretation of 21 U.S.C. § 841 that is plausible but that makes the punishment scheme for LSD irrational. It has been assumed that an irrational federal sentencing scheme denies the equal protection of the laws and therefore (*Bolling v. Sharpe*, 347 U.S. 497 (1954)) violates the due process clause of the Fifth Amendment. *Marshall v. United States*, 414 U.S. 417 (1974); *McGinnis v. Royster*, 410 U.S. 263, 270 (1973); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989); *United States v. Pineda*, 847 F.2d 64 (2d Cir. 1988). The assumption is proper, and in order to avoid having to strike down the statute we are entitled to adopt a reasonable interpretation that cures the constitutional infirmity, even if that interpretation might not be our first choice were there no such infirmity.

The statute bases the range of permissible punishments on the weight of the "mixture or substance containing a detectable amount of" the illegal drug. The statute fixes the minimum and maximum punishments with respect to each drug. Examples are five years minimum and twenty years maximum for selling a hundred grams of a "mixture or substance containing a detectable amount of" heroin and ten years minimum and forty years maximum for selling a kilogram of such a mixture or substance. The corresponding weights for LSD are one gram and ten grams. The quoted words are critical. Drugs are usually consumed, and therefore often sold, in a diluted form, and the adoption by Congress of the "mixture or substance" method of grading punishment reflected a conscious decision to mete out heavy punishment to large retail dealers, who are likely to possess "substantial street quantities," which is to say quantities of the diluted drug ready for sale. H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). That decision is well within Congress's constitutional au-

sions in cases such as *United States v. Holland*, 810 F.2d 1215 (D.C. Cir. 1987) (enhanced penalty for distributing drugs within 1,000 feet of school does not violate due process), certiorari denied, 481 U.S. 1057, are not applicable. Rather, the defendants contend that the statute and the Guidelines require two defendants convicted of selling the same number of doses of LSD for the same amount of money to be sentenced differently if they have chosen different inert carrier media to distribute the LSD.

The defendants have argued that their right to fairness in the criminal justice system, including the right to fair treatment in sentencing, is a fundamental right. Hence they contend that the statute and the Guideline Section at issue here should be subjected to strict scrutiny. See Rotunda, Nowak & Young, Treatise on Constitutional Law: Substance and Procedure § 18.41 (1986). The holding in *Marshall v. Parker*, 470 F.2d 34 (9th Cir. 1972), does not foreclose this argument. In *Marshall* the Ninth Circuit rejected the defendant's claim that the provision under which he was sentenced denied him equal protection. The provision at issue, Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-4255, excludes offenders who have been convicted of a felony on two or more prior occasions from eligibility for a drug rehabilitation treatment program. The Court held that the statute did not create a suspect classification, and that there was no " 'fundamental right' to rehabilitation at public expense." *Id.* at 38. Consequently the Ninth Circuit subjected the statute to rational basis review. The Supreme Court granted certiorari and employed the same standard of review as the Ninth Circuit, noting that the petitioner conceded that "rational basis" was the appropriate standard. *Marshall v. United States*, 414 U.S. 417, 422. A decision that there is no fundamental right to rehabilitation at public expense is not equivalent to a decision that there is no fundamental right to fairness in sentencing.

This case does not require a resolution of whether there is a fundamental right to fairness in sentencing, however, since a difference in sentences based solely on the difference in the weight of an inert ingredient is not rationally related to the government's legitimate goal of eliminating the serious drug problem in this country. Congress' stated purpose in enacting the enhanced penalties of 21 U.S.C. § 841 was to punish major drug traffickers more harshly than minor participants. H.R. Rep. No. 845, 99th Cong., 2d Sess. Part I at 11-12.[7] A statute that punishes those convicted of distributing greater amounts (in terms of weight) of drugs will rationally serve this purpose *if* the drugs being distributed are sold by weight. As the government has conceded, however, LSD is not sold by weight, but by dose. A given number of doses will fetch a given price in the market. Neither the price of those doses nor the number of purchasers of those doses will increase because the LSD is sold on blotter paper instead of in its granular or liquid form. Thus a dealer selling LSD that weighs more because he has chosen to sell the drug on blotter paper will not be a more significant market participant than one who has chosen to sell the same number of doses in granular or liquid form. In fact, it is more likely that those individuals in possession of LSD in its granular or liquid form will be the major actors in any given LSD-trafficking network. They are the individuals who will have either manufactured the drug or acquired it in order to apply it to a chosen carrier medium to facilitate eventual distribution. But under the current

[7] The majority opinion advances three rationales that apparently never occurred to the government since the government briefs contain no mention of any of them. Furthermore, when asked at oral argument whether the Justice Department had suggested any rationale for punishing a distributor of one dose of LSD on a carrier more harshly than a distributor of numerous doses of LSD without a carrier the government attorneys conceded that it had not.

substance or mixture containing the drug. 21 U.S.C. § 841(b)(1)(B)(iv).

Ten sheets of blotter paper, containing a thousand doses of LSD, weigh almost six grams. The LSD itself weighs less than a hundredth as much. If the thousand doses are on gelatin cubes instead of sheets of blotter paper, the total weight is less, but it is still more than two grams, *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987), which is forty times the weight of the LSD. In both cases, if the carrier plus the LSD constitutes the relevant "substance or mixture" (the crucial "if" in this case), the dealer is subject to the minimum mandatory sentence of five years. One of the defendants before us (Marshall) sold almost 12,000 doses of LSD on blotter paper. This subjected him to the ten-year minimum, and the Guidelines then took over and pushed him up to twenty years. Since it takes 20,000 doses of LSD to equal a gram, Marshall would not have been subject to even the five-year mandatory minimum had he sold the LSD in its pure form. And a dealer who sold fifteen times the number of doses as Marshall—180,000—would not be subject to the ten-year mandatory minimum sentence if he sold the drug in its pure form, because 180,000 doses is only nine grams.

At the other extreme, if Marshall were not a dealer at all but dropped a square of blotter paper containing a single dose of LSD into a glass of orange juice and sold it to a friend at cost (perhaps 35 cents), he would be subject to the ten-year minimum. The juice with LSD dissolved in it would be the statutory mixture or substance containing a detectable amount of the illegal drug and it would weigh more than ten grams (one ounce is about 35 grams, and the orange juice in a glass of orange juice weighs several ounces). So a person who sold one dose of LSD might be subject to the ten-year mandatory minimum sentence while a dealer who sold 199,999 doses in pure form would be subject only to the five-year minimum. Defendant Dean (in No. 89-2786) sold 198 doses, crowded onto one sheet of blotter paper: this subjected

him to the five-year mandatory minimum, too, since the ensemble weighed slightly more than a gram.

There are no reported orange juice cases; for that matter there are no reported *federal* cases in which the carrier is a sugar cube rather than a gelatin cube, although sugar cubes are said to be a common LSD carrier, *United States v. Marshall*, 706 F. Supp. 650, 652 (C.D. Ill. 1989), and in two state cases defendants have been prosecuted for unlawful possession of one and of six LSD-laced sugar cubes, respectively. *People v. Urban*, 45 Mich. App. 255, 206 N.W.2d 511 (1973); *Commonwealth v. Cohen*, 359 Mass. 140, 268 N.E.2d 357 (1971). A sugar cube weighs more than two grams, so a seller of a mere six sugar cubes laced with LSD—six doses—would, if prosecuted federally, have bought himself the mandatory minimum ten-year sentence.

All this seems crazy but we must consider whether Congress might have had a reason for wanting to key the severity of punishment for selling LSD to the weight of the carrier rather than to the number of doses or to some reasonable proxy for dosage (as weight is, for many drugs). The only one suggested is that it might be costly to determine the weight of the LSD in the blotter paper, sugar cube, etc., because it is so light! That merely underscores the irrationality of basing the punishment for selling this drug on weight rather than on dosage. But in fact the weight is reported in every case I have seen, so apparently it can be determined readily enough; it *has* to be determined in any event, to permit a purity adjustment under the Guidelines. If the weight of the LSD is difficult to determine, the difficulty is easily overcome by basing punishment on the number of doses, which makes much more sense in any event. To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant.

A person who sells LSD on blotter paper is not a worse criminal than one who sells the same number of doses

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thority even though it may sometimes result in less severe punishment for possessing a purer, and therefore a lighter, form of the illegal drug than a heavier but much less potent form.

The statute fixes only the minimum and maximum punishments and for the actual punishment in a particular case we must go to the Sentencing Guidelines. They proportion punishment to the weight of the mixture or substance, defined as in the statute. § 2D1.1, Application Note 1; § 2D.1, Drug Quantity Table, n. *. They permit an adjustment upward for sales of unusual purity, § 2D1.1, Application Note 9, but this takes care of the problem identified in the previous paragraph only in part; the statutory mandatory minimum sentences (which, like the Guidelines sentences themselves, are not subject to parole) truncate the effort of the Guidelines' framers to tie the severity of punishment in the particular case to the gravity of the defendant's misconduct.

Based as it is on weight, the system I have described works well for drugs that are sold by weight; and ordinarily the weight quoted to the buyer is the weight of the dilute form, although of course price will vary with purity. The dilute form is the product, and it is as natural to punish its purveyors according to the weight of the product as it is to punish moonshiners by the weight or volume of the moonshine they sell rather than by the weight of the alcohol contained in it. So, for example, under Florida law it is a felony to possess one or more gallons of moonshine, and a misdemeanor to possess less than one gallon, regardless of the alcoholic content. Fla. Stat. §§ 561.01, 562.451.

LSD, however, is sold to the consumer by the dose; it is not cut, diluted, or mixed with something else. Moreover, it is incredibly light. An average dose of LSD weighs .05 milligrams, which is less than two millionths of an ounce. To ingest something that small requires swallowing something much larger. Pure LSD in granular form is first diluted by being dissolved, usually in alcohol, and then a quantity of

the solution containing one dose of LSD is sprayed or eye-dropped on a sugar cube, or on a cube of gelatin, or, as in the cases before us, on an inch-square section of "blotter" paper. (LSD blotter paper, which is sold typically in sheets ten inches square containing a hundred sections each with one dose of LSD on it, is considerably thinner than the paper used to blot ink but much heavier than the LSD itself.) After the solution is applied to the carrier medium, the alcohol or other solvent evaporates, leaving an invisible (and undiluted) spot of pure LSD on the cube or blotter paper. The consumer drops the cube or the piece of paper into a glass of water, or orange juice, or some other beverage, causing the LSD to dissolve in the beverage, which is then drunk. This is not dilution. It is still one dose that is being imbibed. Two quarts of a 50-proof alcoholic beverage are more than one quart of a 100-proof beverage, though the total alcoholic content is the same. But a pint of orange juice containing one dose of LSD is not more, in any relevant sense, than a quart of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint. It would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer.

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The weight of the carrier is vastly greater than that of the LSD, as well as irrelevant to its potency. There is no comparable disparity between the pure and the mixed form (if that is how we should regard LSD on blotter paper or other carrier medium) with respect to the other drugs in section 841, with the illuminating exception of PCP. There Congress specified alternative weights, for the drug itself and for the substance or mixture containing the drug. For example, the five-year minimum sentence for a seller of PCP requires the sale of either ten grams of the drug itself or one hundred grams of a

is lower for crack—half a kilogram—this still translates into 50,000 doses.

LSD is a potentially dangerous drug, especially for psychotics (whom it can drive to suicide). Hoffman, LSD: My Problem Child 67-71 (1983). But many things are dangerous for psychotics. No one believes that LSD is a more dangerous drug than heroin or cocaine (particularly crack cocaine). The general view is that it is *much* less dangerous. Cox, *et al.*, Drugs and Drug Abuse: A Reference Text 313-15 (1983). There is no indication that Congress believes it to be more dangerous, or more difficult to control. The heavy sentences that the law commands for minor traffickers in LSD are the inadvertent result of the interaction among a statutory procedure for measuring weight, adopted without understanding how LSD is sold; a decision to specify harsh mandatory minimum sentences for drug traffickers, based on the weight of the drug sold; and a decision (gratuitous and unreflective, as far as I can see) by the framers of the Guidelines to key punishment to the statutory measure of weight, thereby amplifying Congress's initial error and ensuring that the big dealer who makes or ships the pure drug will indeed receive a shorter sentence than the small dealer who handles the stuff in its street form. As the wholesale value of LSD may be as little as 35 cents a dose (Report 1988: The Supply of Illicit Drugs to the United States 52 (National Narcotics Intelligence Consumers Comm. 1989)), a seller of five sugar cubes could be subject to a mandatory minimum prison term of ten years for selling $2 worth of illegal drugs. Dean received six years (no parole, remember) for selling $73 worth. The irrationality is quite bad enough if we confine our attention to LSD sold on blotter paper, since the weight of blotter paper varies considerably, making punishment turn on a factor that has no relation to the dosages or market values of LSD.

Well, what if anything can we judges do about this mess? The answer lies in the shadow of a jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as "equal protection of the laws") authorize judges to enrich positive law with the moral values and practical concerns of civilized society. Judges who in other respects have seemed quite similar, such as Holmes and Cardozo, have taken opposite sides of this issue. Neither approach is entirely satisfactory. The first buys political neutrality and a type of objectivity at the price of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness. It is no wonder that our legal system oscillates between the approaches. The positivist view, applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words (taken one by one) of the relevant enactments. The natural law or pragmatist view leads to a freer interpretation, one influenced by norms of equal treatment; and let us explore the interpretive possibilities here. One is to interpret "mixture or substance containing a detectable amount of [LSD]" to exclude the carrier medium—the blotter paper, sugar or gelatin cubes, and orange juice or other beverage. That is the course we rejected in *United States v. Rose*, *supra*, 881 F.2d at 388, as have the other circuits. I wrote *Rose*, but I am no longer confident that its literal interpretation of the statute, under which the blotter paper, cubes, etc. are "substances" that "contain" LSD, is inevitable. The blotter paper, etc. are better viewed, I now think, as carriers, like the package in which a kilo of cocaine comes wrapped or the bottle in which a fifth of liquor is sold.

Interpreted to exclude the carrier, the punishment schedule for LSD would make perfectly good sense; it would

on gelatin cubes, but he is subject to a heavier punishment. A person who sells five doses of LSD on sugar cubes is not a worse person than a manufacturer of LSD who is caught with 19,999 doses in pure form, but the former is subject to a ten-year mandatory minimum no-parole sentence while the latter is not even subject to the five-year minimum. If defendant Chapman, who received five years for selling a thousand doses of LSD on blotter paper, had sold the same number of doses in pure form, his Guidelines sentence would have been fourteen months. And defendant Marshall's sentence for selling almost 12,000 doses would have been four years rather than twenty. The defendant in *United States v. Rose*, 881 F.2d 386, 387 (7th Cir. 1989), must have bought an unusually heavy blotter paper, for he sold only 472 doses, yet his blotter paper weighed 7.3 grams—more than Chapman's, although Chapman sold more than twice as many doses. Depending on the weight of the carrier medium (zero when the stuff is sold in pure form), and excluding the orange juice case, the Guidelines range for selling 198 doses (the amount in *Dean*) or 472 doses (the amount in *Rose*) stretches from ten months to 365 months; for selling a thousand doses (*Chapman*), from fifteen to 365 months; and for selling 11,751 doses (*Marshall*), from 33 months to life. In none of these computations, by the way, does the weight of the LSD itself make a difference—so slight is its weight relative to that of the carrier—except of course when it is sold in pure form. Congress might as well have said: if there is a carrier, weigh the carrier and forget the LSD.

This is a quilt the pattern whereof no one has been able to discern. The legislative history is silent, and since even the Justice Department cannot explain the why of the punishment scheme that it is defending, the most plausible inference is that Congress simply did not realize how LSD is sold. The inference is reinforced by the statutory treatment of PCP.

We can actually *measure* the rationality of the punishment scheme for LSD, by regressing the Guidelines sentence on the number of doses sold. The sentence should increase with the number of doses, and the number of doses should explain most of the variance in sentences. Using the different weights of blotter paper disclosed by the cases (including *Dean*), plus gelatin cubes, sugar cubes, and no carrier (for sales of pure LSD) as additional dosage forms, I have been able to calculate that for sales of between one dose and a thousand, although the average Guidelines sentence does increase with the number of doses, that number explains only 23 percent of the possible sentencing variance for these different methods of selling the drug. For sales of between one dose and 180,000 doses the amount of variance explained falls to 16 percent. Differences in the severity of punishment are determined by differences in the weight of the carrier medium, even though that weight is completely irrelevant to culpability. I have abstracted from criminal history and other personal factors that might influence the sentence of a particular defendant, but I have not abstracted from the mandatory minimum sentencing provisions, because they are a key element in the irrationality of the scheme for punishing LSD offenders.

That irrationality is magnified when we compare the sentences for people who sell other drugs prohibited by 21 U.S.C. § 841. Marshall, remember, sold fewer than 12,000 doses and was sentenced to twenty years. Twelve thousand doses sounds like a lot, but to receive a comparable sentence for selling heroin Marshall would have had to sell ten kilograms, which would yield between one and two million doses. Platt, Heroin Addiction: Theory, Research, and Treatment 50 (2d ed. 1995); cf. Diamorphine 63, 98 (Scott ed. 1988). To receive a comparable sentence for selling cocaine he would have had to sell fifty kilograms, which would yield anywhere from 325,000 to five million doses. Washton, Cocaine Addiction: Treatment, Recovery and Relapse Prevention 18 (1989); Cocaine Use in America: Epidemiologic and Clinical Perspectives 214 (Kozel & Adams, eds., National Institute on Drug Abuse Pamphlet No. 61, 1985)). While the corresponding weight

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not warp the statutory design. The comparison with heroin and cocaine is again illuminating. The statute imposes the five-year mandatory minimum sentence on anyone who sells a substance or mixture containing a hundred grams of heroin, equal to 10,000 to 20,000 doses. One gram of pure LSD, which also would trigger the five-year minimum, yields 20,000 doses. The comparable figures for cocaine are 3250 to 50,000 doses, placing LSD in about the middle. So Congress may have wanted to base punishment for the sale of LSD on the weight of the pure drug after all, using one and ten grams of the pure drug to trigger the five-year and ten-year minima (and corresponding maxima—twenty years and forty years). This interpretation leaves "substance or mixture containing" without a referent, so far as LSD is concerned. But we must remember that Congress used the identical term in each subsection that specifies the quantity of a drug that subjects the seller to the designated minimum and maximum punishments. In thus automatically including the same term in each subsection, Congress did not necessarily affirm that, for each and every drug covered by the statute, a substance or mixture containing the drug *must* be found.

The flexible interpretation that I am proposing is decisively strengthened by the constitutional objection to basing punishment of LSD offenders on the weight of the carrier medium rather than on the weight of the LSD. Courts often do interpretive handsprings to avoid having even to *decide* a constitutional question. *Gomez v. United States*, 109 S. Ct. 2237, 2241 (1989). In doing so they expand, very questionably in my view, the effective scope of the Constitution, creating a constitutional penumbra in which statutes wither, shrink, are deformed. A better case for flexible interpretation is presented when the alternative is to nullify Congress's action: when in other words there is not merely a constitutional question about, but a constitutional barrier to, the statute when interpreted literally. *Hooper v. California*, 155 U.S. 648, 657 (1895). This is such a case.

The Supreme Court held in *Bolling v. Sharpe* that action by the federal government which if it were state ac-

tion would violate the equal protection clause of the Fourteenth Amendment violates the due process clause of the Fifth Amendment (the Fifth Amendment contains no equal protection clause). This, then, is a form of "substantive due process" expressly approved by the Supreme Court; disparage it—reject it—and you affirm the power of the federal government to practice racial discrimination, since the constitutional prohibition against such discrimination derives from the equal protection clause. Because under *Bolling v. Sharpe* equal protection is a duty of the federal government, it does not matter that, viewed in isolation, the sentences in the cases before us are not so disproportionate to the gravity of the defendants' conduct that they violate the loose principles of proportionality that courts have found in the Eighth Amendment's prohibition of cruel and unusual punishments. Cf. *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam). The sentences stand condemned under a different principle: that which forbids the unequal treatment of people identically situated. That this principle exists and is potentially applicable to criminal punishment can scarcely be doubted, quite apart from the cases cited at the beginning of this opinion. Suppose that through a draftman's error a statute fixed a two-year minimum sentence for attempted larceny and a one-year minimum for larceny. A person sentenced for attempted larceny could not complain that his punishment was cruel and unusual, but he could complain that he was being punished pursuant to an irrational punishment scheme. And so with the dealer who sells a thousand doses of LSD on heavy blotter paper, the dealer who sells a thousand doses on light blotter paper, the dealer who sells the same number of doses on gelatin cubes, the dealer who sells the same number on sugar cubes, and the dealer who sells the same number in pure form: all these dealers are identically situated, so far as the purposes animating the drug statute are concerned; all can complain, therefore, that they are being sentenced pursuant to an irrational scheme that denies them the equal protection of the laws.

Not all types of dealer are before us in these two cases, it is true; but in challenging a statute as a denial of equal protection a plaintiff will invariably be comparing his situation under the statute with those of persons not before the court. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Orr v. Orr*, 440 U.S. 268, 272-73 (1979); *Kucharek v. Hanaway*, 902 F.2d 513, 516, 520-21 (7th Cir. 1990). How could it be otherwise? If a tax statute exempts a class of taxpayers on grounds claimed to be irrational, no member of that class will attack the exemption as a denial of equal protection, yet the challenger must be able to point to the favored class in support of his constitutional challenge. He is permitted to do this without having to drag the members of that class into court. The defendants in the cases before us point to the manufacturer who ships LSD in granular form (the sensible way to ship it, since that is the lightest and most compact form), the dealer who sells LSD on gelatin cubes rather than blotter paper, and the dealer who uses light rather than heavy blotter paper, as persons irrationally exempted from the heavy sentences that the mandatory minimum punishment provisions of section 841, in conjunction with the provisions of the Guidelines, have placed the defendants in our cases under. The defendants have no standing to complain about the hypothetical punishment of the person who sells LSD in sugar cubes or glasses of orange juice, but, as with the use of hypothetical cases in legal reasoning generally, these examples are relevant to exploring the logic behind the scheme of punishment—and show that there is none.

The point is not that the judicial imagination can conjure up anomalous applications of the statute. A statute is not irrational because its draftsmen lacked omniscience. The point is that graduating punishment to the weight of the carrier medium produces, in the case of LSD, a systematically, unavoidably bizarre schedule of punishments that no one is able to justify. I would give respectful consideration to *any* rationale for the schedule advanced by the legislators, the framers of the Guidelines, or the Department of Justice. None has been advanced. And such

give as there is in the Guidelines (the purity adjustment) is unavailing when defendants are subject to the mandatory minimum sentences in section 841, as all the defendants before us (plus Dean) are.

Granted, when the total system of federal criminal punishment is considered, including prosecutorial discretion and executive clemency, it becomes arguable that the grossest inequities enabled by reading section 841 to base punishment on the weight of the carrier rather than of the LSD are unlikely to occur. Maybe that is why we have seen no recent sugar-cube cases. But this argument is too powerful; it would eliminate or at least greatly curtail the judicial role in protecting criminal defendants from arbitrary statutes, by preventing the defendant from showing that the statute was arbitrary.

Our choice is between ruling that the provisions of section 841 regarding LSD are irrational, hence unconstitutional, and therefore there is no punishment for dealing in LSD—Congress must go back to the drawing boards, and all LSD cases in the pipeline must be dismissed—and ruling that, to preserve so much of the statute as can constitutionally be preserved, the statutory expression "substance or mixture containing a detectable amount of [LSD]" excludes the carrier medium. Given *this* choice, we can be reasonably certain that Congress would have preferred the second course; and this consideration carries the argument for a flexible interpretation over the top.

That interpretation would bring the statute into line with the punishment for other illegal drugs; but this is only an incidental benefit because, as ruled in *Rose* (correctly, as it seems to me and has seemed to the other courts that have considered the question, see *United States v. Elrod*, 898 F.2d 60 (6th Cir. 1990) (per curiam), and other cases cited there), it is not a feasible judicial office to rationalize the thousands of different federal criminal prohibitions, passed at different times in different climates of opinion, that are scattered throughout the United States Code. Cf. *United States v. Batchelder*, 442 U.S. 114 (1979); *Edwards v. United States*, 814 F.2d 486, 489 (7th Cir. 1987). The relevant irrationality—which was not presented

as an issue in *Rose* and which has not received full consideration in any other case either, although there are glancing references to it in *United States v. Bishop*, 894 F.2d 981, 985-86 (8th Cir. 1990), and *United States v. Elrod, supra*, 898 F.2d at 63; cf. *United States v. Bayerle*, 898 F.2d 28, 31 (4th Cir. 1990)—lies in making the punishment of LSD offenders vary by the adventitious and indeed perverse factor of the weight of the carrier. But it is reassuring that in removing this irrationality from section 841 we would create no new disparities between the punishment of sellers of LSD and the punishment of other drug offenders.

The literal interpretation adopted by the majority is not inevitable. All interpretation is contextual. The words of the statute—interpreted against a background that includes a constitutional norm of equal treatment, a (closely related) constitutional commitment to rationality, an evident failure by both Congress and the Sentencing Commission to consider how LSD is actually produced, distributed, and sold, and an equally evident failure by the same two bodies to consider the interaction between heavy mandatory minimum sentences and the Sentencing Guidelines—will bear an interpretation that distinguishes between the carrier vehicle of the illegal drug and the substance or mixture containing a detectable amount of the drug. The punishment of the crack dealer is not determined by the weight of the glass tube in which he sells the crack; we should not lightly attribute to Congress a purpose of punishing the dealer in LSD according to the weight of the LSD carrier. We should not make Congress's handiwork an embarrassment to the members of Congress and to us.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—7-17-90—500

DOCKET NUMBER 108
U.S. DISTRICT COURT
WEST DIST. OF WISCONSIN
OCT 13 1989
FILED
JOSEPH W. SKUPNIEWITZ, CLERK
CASE NUMBER

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PATRICK D. BRUMM, RICHARD L. CHAPMAN, and JOHN M. SCHOENECKER,

Defendants.

ORDER

89-CR-46-C

These defendants all face sentencing for violation of 21 U.S.C. §841, which sets a minimum five-year sentence as the penalty for distribution of "1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." 21 U.S.C. §841(b)(1)(B)(v).

Each defendant has been convicted of distributing 1000 doses, or "hits," of LSD. Each hit consisted of one square of special blotter paper that had been saturated with an LSD-alcohol mixture. (According to defendants, LSD is so potent in its pure form that it is commonly mixed with alcohol and the resulting mix is so unstable it can only be captured and conveyed by putting a spot of it onto a medium such as blotter paper, sugar cubes, gelatin, or candy.)

Calculating the weight of the LSD (le[illegible]n one gram),

A copy of this document has been provided to: Vandreuil, Hassett, Eisenberg & Kelly
this 16 day of Oct, 1989.
By L. Jessen Deputy Clerk
cc: Proba

together with the weight of the blotter paper (5.7 grams), puts each defendant in a sentencing guideline range of 120 to 150 months, and subjects each of them to the mandatory minimum term of five years provided under §841. The government has agreed that it will recommend a downward departure from the guideline range, pursuant to Section 5K1.1 of the Sentencing Guidelines, but will not recommend a sentence below the mandatory five year minimum.

Defendants have moved to have the court declare unconstitutional both the statutory minimum mandatory sentence and the Sentencing Guidelines. They contend that the penalties set forth under the statute and the guidelines violate the due process clause of the United States Constitution because they are arbitrary and capricious and bear no reasonable relationship to a proper legislative purpose. They contend also that the penalties violate the equal protection clause, which requires that classifications made by a statute be reasonable in light of the statute's purpose.

It is defendants' position that the goal of drug trafficking legislation is to provide harsher penalties for possession or distribution of larger quantities of illicit drugs, and therefore, in a rational system, the potential punishment would increase as the quantity of drugs increased. Given the manner in which LSD is distributed, however, there is no natural relationship between the weight of the drug distributed and the penalties because the weight

of the drug increases depending on the weight of the medium used to distribute it and not necessarily on the amount of drug being distributed. Defendants point out that under the present statute, possession of a vial containing 50 liquid milligrams of LSD would expose a person to lesser penalties than would possession of the same amount of LSD mixed with alcohol and put into sugar cubes or onto blotter paper.

In a recent decision, United States v. Rose, 881 F.2d 386 (7th Cir. 1989), the Court of Appeals for the Seventh Circuit held both that blotter paper was a "substance or mixture containing a detectable amount of [LSD]," and that the widely varying penalties set for different substances under 21 U.S.C. §841 were not irrational and did not violate the equal protection clause. The court of appeals made it clear that it is not the courts' role to second-guess such congressional determinations as the one challenged by defendant Rose, that LSD is 100,000 times more dangerous than marijuana, as the minimum mandatory penalty structure in §841 suggests. "The Constitution has not been interpreted to require that the pattern of punishments for different federal crimes compose a harmonious whole." Id. at 388.

Defendants contend that the due process and equal protection arguments they are raising in this case were neither raised nor addressed in Rose, and remain open for consideration. However, it

appears that, in deciding that blotter paper was a mixture or substance within the meaning of §841, the court of appeals decided that it was not irrational to calculate sentences based on the weight of the mixture rather than upon the weight of the pure LSD, and that, in holding constitutional the apparent irrationalities in the federal criminal code, the court forestalled any argument based upon the apparent irrationality of basing criminal penalties upon the weight of the carrier of the LSD.

In any event, even if the questions were still open, I would decide against defendants. Their arguments are compelling, but they are addressed to the wrong forum. It is Congress to whom they should be appealing to change the penalty structure of §841.

On its face, the penalty provision for LSD suggests that Congress was aware of the fact that the drug is not sold in its pure form but in mixtures or dissolved in another substance. The statute imposes a minimum term of imprisonment for a violation involving "1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." It is inevitable that the "mixtures or substances" containing a detectable amount of LSD would vary in weight. Congress could have avoided any resulting unfairness by specifying that the weight of the pure LSD would control the determination of the penalty but it did not. Presumably, it wanted to impose heavy penalties on the

transportable form of the drug, since it was in that form that it posed the greatest danger. It was not irrational for Congress to make that choice or, having made it, to decline to provide separate penalties for every possible medium in which the drug might be distributed.

Defendants argue that LSD is a special case. They maintain that it is rational to raise penalties as weights incease when setting penalties for the sale of other drugs, such as cocaine, but that it is not rational to do so for LSD. However, minimum mandatory penalties and sentencing guidelines are set for other drugs without consideration of the purity of the drug or the proportion of the weight of the drug to the weight of the mixture containing the drug. For example, cocaine is rarely sold in its pure form; it is frequently mixed with other substances such as corn starch or Inositol. Under both the statute and the sentencing guidelines, persons who sell 500 grams of heavily cut cocaine can be subjected to the same penalties as persons who sell 500 grams of pure cocaine. (Under the sentencing guidelines a person can be given an "enhancement" if the cocaine he has sold is of greater purity; otherwise the same penalties prevail.) That this is so may seem irrational, and might even be irrational in a perfect world, but it reflects both an appreciation of the dangers of wide distribution of illicit drugs and the difficulties of trying to

legislate for all of the possible permutations of drug packaging and sales techniques.

I conclude that defendants have failed to show that subjecting them to penalties under the statute or under the sentencing guidelines based on the combined weight of the carrier and of the LSD itself is a violation of their federal constitutional rights to due process and to equal protection of the laws.

ORDER

IT IS ORDERED that defendants' motions to have the court declare the sentencing guidelines and 21 U.S.C. §841 unconstitutional as they apply to the distribution of LSD are DENIED.

Entered this 13th day of October, 1989.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

U.S. Department of Justice

United States Attorney
Western District of Wisconsin

Room 420, United States Courthouse 608/264-5158
120 N. Henry Street FTS/364-5158
Madison, Wisconsin 53703

September 11, 1989

Mr. T. Christopher Kelly
Attorney at Law
121 South Hamilton St.
Madison, WI 53703

Re: United States v. Chapman, Brumm, and Schoenecker
Case No. 89-CR-46-C

Dear Mr. Kelly:

This letter is written in response to your letter of September 5, 1989. I am willing to agree, for the purpose of sentencing and appeal, that the weight of the LSD distributed in this case, apart from the weight of the blotter paper, was less than one gram. I am also willing to agree that LSD is commonly sold by the "hit" without regard to the weight of the carrier that contains that dosage.

Very truly yours,

PATRICK J. FIEDLER
United States Attorney

By: John W. Vaudreuil

JOHN W. VAUDREUIL
Assistant U. S. Attorney

JWV:njt

cc: Mr. Stephen J. Eisenberg
Attorney at Law
121 East Wilson St.
Madison, WI 53703

Mr. Scott Hassett
Attorney at Law
214 West Mifflin St.
Madison, WI 53703

Judgment Including Sentence Under the Sentencing Reform Act

DOCKET NUMBER

U.S. DISTRICT
WEST. DIST. OF

OCT 24 1989

FILED/RECEIVED
JOSEPH W. SKUPNIEWITZ, CLERK

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

V.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

CASE NO. 89-CR-046-C-02

RICHARD L. CHAPMAN

(Name of Defendant)

(T. CHRISTOPHER KELLY)
Defendant's Attorney

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC §841(a)(1)	Distribute Schedule I-Lysergic Acid Diethylamide (LSD)	One
18 USC §2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).
( ) Count(s) [ ] (is) (are) dismissed on the motion of the United States.
( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
(x) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[396-62-0623]

Defendant's mailing address:
[Rock County Jail]
[Janesville, WI 53545]

Defendant's residence address:
[Rock County Jail]
[Janesville, WI 53545]

[October 19, 1989]
Date of Imposition of Sentence

Barbara B Crabb
Signature of Judicial Officer

[BARBARA B. CRABB
U.S. DISTRICT JUDGE]
Name and Title of Judicial Officer

October 20, 1989
Date

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has elected to depart downward from the guidelines based on the defendant's substantial assistance to authorities. The sentence should provide adequate punishment, deterrence and protection of the public from further criminality on the part of the defendant.

As to the one-count Information, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 96 months to be followed by a five-year term of supervised release. As special conditions of supervised release: 1)the defendant is to abstain from the use of alcohol and from illegal drug use, sales, and associations, and to participate in a program of counseling and urine surveillance as directed by the supervising U.S. Probation officer; 2)the defendant is to participate in outpatient mental health counseling as directed by the supervising U.S. Probation officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impair the defendant's abilities to support himself upon release. The Order of the Magistrate dated April 20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

It is recommended that the defendant be afforded the opportunity to particpate in the substance abuse treatment program at FMC-Rochester and that the last 6 months of his confinement be spent in a community corrections center (CCC).

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until between the hours of ^C and ^C when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on . It is further ordered that the present conditions of release are continued until .

The defendant shall surrender to the United States Marshal for this district

[ ] between the hours of and on .

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to at , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment Including Sentence Under the Sentencing Reform A

NUMBER
U.S. DISTRICT
WEST. DIST. OF
OCT 24 1989
FILED/RECEIVED
JOSEPH W. SKUPNIEWITZ, CLERK

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

V.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

CASE NO

JOHN M. SCHOENECKER

(Name of Defendant)

(89-CR-046-C-03)
Defendant's Attorney

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC §841(a(1)	Distribute Schedule I-Lysergic Acid Diethylamide (LSD)	One
18 USC §2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).
( ) Count(s) [ ] (is) (are) dismissed on the motion of the United States.
( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
(x) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[392-70-9669]

Defendant's mailing address:
[ROCK COUNTY JAIL]
[JANESVILLE, WI 53545]

Defendant's residence address:
[ROCK COUNTY JAIL]
[JANESVILLE, WI 53545]

[OCTOBER 19, 1989]
Date of Imposition of Sentence

Barbara B. Crabb
Signature of Judicial Officer

[BARBARA B. CRABB
U.S. DISTRICT JUDGE]
Name and Title of Judicial Officer

October 20, 1989
Date

BEST AVAILABLE COPY

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has selected a term at the lower end of the guideline range because the court is of the opinion that the sentence is sufficient to comply with the purposes of sentencing as set forth in 18 USC §3553. The sentence provies more than adequate punishment, deterrence and protection of the public from further criminality on the part of the defendant.

As the the one-count Information, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 63 months to be followed by a four-year term of supervised release. As a special condition of supervised release, the defendant is to abstain from illegal drug use, sales, and associations, and is to participate in a program of drug counseling and urine surveillance as directed by the supervising U.S. probation officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impair the defendant's abilities to support himself upon release. The order of the Magistrate dated April 20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until between the hours of and when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on . It is further ordered that the present conditions of release are continued until .

The defendant shall surrender to the United States Marshal for this district

[ ] between the hours of and on .

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to at , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment Including Sentence Under the Sentencing Reform Act 116

U.S. DISTRICT COURT
WEST. DIST. OF WISCONSIN

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

OCT 20 1989

FILED
JOSEPH W. SKUPNIEWITZ, CLERK

UNITED STATES OF AMERICA

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

V.

CASE NO. 89-CR-046-C-01

PATRICK D. BRUMM

(Name of Defendant)

(STEVE EISENBERG)
Defendant's Attorney

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC §841(a)(1)	Distribute Schedule 1-Lysergic Acid Diethylamide (LSD)	
18 USC §2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).
( ) Count(s) [ ] (is) (are) dismissed on the motion of the United States.
( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
(X) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[390-50-2987]

Defendant's mailing address:
[1239 SPAIGHT STREET]
[MADISON, WI 53703]

Defendant's residence address:
[1239 SPAIGHT STREET]
[MADISON, WI 53703]

[OCTOBER 19, 1989]
Date of Imposition of Sentence

Barbara B. Crabb
Signature of Judicial Officer

[BARBARA B. CRABB
U.S. DISTRICT JUDGE]
Name and Title of Judicial Officer

October 20, 1989
Date

BEST AVAILABLE COPY

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has selected to depart downward from the guidelines based on the defendant's substantial assistance to authorities. The court is also of the opinion that the sentence imposed here is more than sufficient to comply with the the purposes of sentencing as set forth in 18 USC §3553. The sentence provides more than adequate punishment, deterrence and protection of the public from further criminal acts on the part of the defendant.

As to the one-count Indictment, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 60 months to be followed by a four-year term of supervised release. As a special condition of supervised release, the defendant is to abstain from illegal drug use, sales, and associations, and is to participate in a program of drug counseling and urine surveillance as directed by the supervising U.S. probation officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impede the defendant's abilities to support himself upon release.

The order of the Magistrate dated April 20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until November 27, 1989, between the hours of 10:00 AM and noon when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on November 27, 1989. It is further ordered that the present conditions of release are continued until November 27, 1989.

The defendant shall surrender to the United States Marshal for this district

[ ] between the hours of and on .

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to at , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

ORIGINAL

No. 90-5744

Supreme Court, U.S.
FILED
NOV 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RICHARD L. CHAPMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in determining the weight of lysergic acid diethylamide (LSD) for sentencing purposes, the court correctly considered the combined weight of the LSD and the blotter paper used as a carrier medium for the drug.

2. Whether considering the combined weight of the LSD and the blotter paper used as a carrier medium for the drug for sentencing purposes violates due process.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-5744

RICHARD L. CHAPMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-25A) is reported at 908 F.2d 1312. The memorandum opinion of the district court (Pet. App. 26A-31A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1990. The petition for a writ of certiorari was filed on September 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioners were convicted of distributing lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841(a)(1). Petitioner Chapman was sentenced to a term of 96 months' imprisonment; petitioner Schoenecker was sentenced to a term of 63 months' imprisonment; and petitioner Brumm was sentenced to a term of 60 months' imprisonment. The en banc court of appeals affirmed.

1. The facts are not in dispute. Petitioners were convicted of selling ten sheets (1,000 doses) of paper impregnated with LSD. The weight of the LSD-imbedded paper totalled 5.7 grams; however, it was stipulated that the weight of pure LDS from which the paper was prepared was less than one gram. Pet. App. 32A. In accordance with the directive in United States Sentencing Comm'n, Guidelines Manual § 2D1.1 Drug Quantity Table n.* (1990), that "the entire amount of the mixture or compound" that "contains any detectable amount of a controlled substance * * * shall be considered in measuring the quantity" of the drug involved, the district court calculated the sentencing range for petitioners' offense in light of the 5.7-gram combined weight of the LSD and the medium paper.

Because more than one gram of LSD was involved, 21 U.S.C. 841(b)(1)(B)(v) required the imposition of a mandatory minimum penalty of five years' imprisonment. In addition, because more than four but less than seven grams of LSD was involved, petitioners' base offense level under the Sentencing Guidelines was

placed at level 28. Had the weight of the pure LSD alone been considered, petitioners would not have been liable to a mandatory minimum sentence and their base offense level under the Guidelines would have been at least four levels lower.

The government thereafter filed a motion under Guidelines § 5K1.1 allowing the district court to depart below the indicated Guidelines range because of petitioners' substantial cooperation; however, the government refused to file a motion under 18 U.S.C. 3553(e) allowing the district court to sentence below the mandatory minimum imposed by statute. The district court then sentenced petitioners to terms of imprisonment that were below the Guidelines range, but at or above the statutory mandatory minimum.

2. A divided court of appeals, sitting en banc, affirmed petitioners' sentences. Pet. App. 1A-25A. As the en banc majority noted, both the federal drug statutes and the Sentencing Guidelines provide an escalating range of punishments for drug offenses based on the weight of any "mixture or substance containing a detectable amount" of a controlled substance. Id. at 2A, 6A. In light of this unambiguous language, the majority found that "[i]t is not possible * * * to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug." Id. at 4A. Thus, in accord with the conclusion reached by other courts of appeals considering the same issue, the en banc majority held that LSD carrier mediums -- including blotter paper

-- constitute "mixture[s] or substance[s] containing a detectable amount" of the drug and therefore must be included in calculating the drug's weight. Id. at 5A, 6A.

As the en banc majority further stated, this scheme that "make[s] the sentence increase with quantity" was "a rational way to proceed" and, hence, was constitutional. Pet. App. 9A. Nor was a different conclusion required with regard to this sentencing scheme when applied to blotter paper that had been infused with LSD. First, as the majority explained, because the use of blotter paper was an ingredient that made LSD easier to transport, conceal, and sell, it was rational for Congress and the Sentencing Commission to include its weight as part of the "mixture or substance" containing LSD. Id. at 11A. Second, because blotter paper was the carrier medium used in virtually all cases involving LSD, it was rational for Congress and the Sentencing Commission to address the statutes and the Sentencing Guidelines "to the main cases rather than the exceptions." Id. at 11A-12A. Finally, the legislative decision to include the weight of the blotter paper was rational since it would be costly and technologically difficult to extract and accurately weigh the amount of LSD contained in the blotter paper. Id. at 12A. In short, as the majority noted, petitioners selected the lightest and most common carrier medium available for distributing their LSD; they were therefore "in no position to complain" that the statute or the Sentencing Guidelines were unconstitutional as applied to them. Id. at 12A.

Five judges dissented. In their view, Congress did not intend that LSD carrier mediums, such as blotter paper, should be considered a "mixture or substance" for purposes of determining the weight of LSD for sentencing purposes. Pet. App. 14A-16A. Even if Congress intended that the weight of the carrier medium be included in calculating the weight of LSD, however, the dissenters believed that such a sentencing scheme would offend due process principles "since a difference in sentence based solely on the difference in the weight of an inert ingredient is not rationally related to the government's legitimate goal of eliminating the serious drug problem in this country." Id. at 17A.

ARGUMENT

Relying principally on the dissent below and on the decision in United States v. Healy, 729 F. Supp. 140 (D.D.C. 1990), appeal pending, petitioners contend that the sentencing judge erred in calculating the sentencing range for their conduct based upon the combined weight of the LSD and the blotter paper used as a carrier medium. Pet. 10-26. Petitioners argue that such a result is contrary to the intended meaning of the statute and, in any event, would be unconstitutionally arbitrary even if it were intended. Petitioners' claim, however, is contrary to the plain language of the Sentencing Guidelines and to the plain language of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, from which the applicable Guideline provision is drawn. Moreover, petitioners' claim has been rejected by every court of appeals (six in all) that has considered this question. See United States v.

Larsen, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509; United States v. Elrod, 898 F.2d 60 (6th Cir. 1990); United States v. Bishop, 894 F.2d 981, 985-987 (8th Cir. 1990); United States v. Daly, 883 F.2d 313, 316-318 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); United States v. Taylor, 868 F.2d 125, 127-128 (5th Cir. 1989). Accord United States v. Marshall, 706 F. Supp. 650 (C.D. Ill. 1989), aff'd, 908 F.2d 1312 (7th Cir. 1990) (en banc) (decision below); United States v. Bishop, 704 F. Supp. 910 (N.D. Iowa 1989), aff'd, 894 F.2d 981 (8th Cir. 1990). This Court recently declined to review the same claim in Daly v. United States, certiorari denied, 110 S.Ct. 2622 (1990). No different result is warranted here.[1/]

In enacting the Anti-Drug Abuse Act of 1986, Congress provided a range of escalating penalties for persons committing offenses involving escalating weights of any "mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." 21 U.S.C. 841(b)(1)(A)(v) & (B)(v). That formulation amended the predecessor statute, which imposed penalties based only on the weight of the LSD itself. 21 U.S.C. 841(b)(1)(A)(iv) (Supp. III 1982). The 1986 amendment therefore authorized sentencing courts to take into account the weight of any carrier medium when calculating the appropriate sentence for an LSD-related offense. See United States v. McGeehan, 824 F.2d 677, 681 (8th Cir. 1987),

---

[1/] We note that the same issue is pending before the Court in Follett v. United States, No. 90-590 (filed Oct. 3, 1990), Bolton v. United States, No. 90-5624 (filed Sept.4, 1990), and Larsen v. United States, No. 90-5509 (filed Aug. 20, 1990).

cert. denied, 484 U.S. 1061 (1988). "This [1986] amendment demonstrate[d] that Congress was aware of the differences between LSD and LSD combined with a carrier substance," ibid. -- a difference that was especially apparent since, in enacting the 1986 amendments, Congress retained separate penalty ranges for offenses involving pure amounts of PCP and offenses involving "a mixture or substance containing a detectable amount of * * * PCP." 21 U.S.C. 841(b)(1)(A)(iv) and (B)(iv).[2/]

The Sentencing Commission used the same formulation in specifying the various offense levels under the Drug Quantity Table. As the Guidelines provide: "The scale amounts for all

---

[2/] The House Judiciary Committee explained the rationale for Congress's decision to change the method by which most controlled substances were weighed for sentencing purposes from the pure weight of the controlled substance to the total weight of any "mixture or substance" containing a detectable amount of a proscribed drug:

> After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. The Committee's statement of quantities is of mixtures, compounds or preparations that contain a detectable amount of the drug -- these are not necessarily quantities of pure substance. One result of this market-oriented approach is that the Committee has not generally related these quantities to the number of doses of the drug that might be present in a given sample. The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. 1, at 11-12 (1986).

controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity." Guidelines § 2D1.1(a)(3) Drug Quantity Table p. 2.39 n.* (Oct. 1987).[3/] See also id. p. 2.47 Application Note No. 10 ("The Commission has used the sentences provided in, and the equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences").[4/]

[3/] The reference in the footnote to a "mixture of a compound" appears to be a typographical error in view of the Commission's use of the phrase "mixture or compound" in the following clause of the footnote (emphasis added). This is especially true since the Anti-Drug Abuse Act, on which the Guideline provision is modeled, is framed in the disjunctive.

[4/] Subsequent clarifying amendments to the Sentencing Guidelines are to the same effect. Thus, the footnote now accompanying § 2D1.1's Drug Quantity Table states:

> Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the higher offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined for the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater.

Guidelines § 2D1.1 Drug Quantity Table p. 2.47 n.* (Nov. 1, 1990). See also id. p. 2.48 Application Note No. 1 ("'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841").

There is "no ambiguity" in the language of the statute or the Guideline. United States v. Taylor, 868 F.2d at 127.[5/] As the Fourth Circuit correctly recognized in United States v. Daly, 883 F.2d at 317, "determining sentences on the basis of the aggregate weight of the drug itself and the 'carrier medium' clearly comports with the 'plain language' of the Anti-Drug Abuse Act itself and § 2D1.1 of the Guidelines, which expressly adopts that statute's 'mixture or substance' formulation as the benchmark for most drug quantity determinations." With respect to LSD-related offenses, blotter paper infused with LSD clearly meets the definitional formulation since the paper unquestionably constitutes "a substance," i.e., "a distinguishable kind of physical matter," that contains a "detectable amount" of LSD. See United States v. Bishop, 894 F.2d at 985 (citation omitted).

Moreover, treating LSD mediums in such a manner is consistent with the manner in which carrier mediums and cutting agents for other controlled substances are treated. "Drugs are rarely taken

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[5/] Petitioners suggest that the rule of lenity should be applied since it is unclear whether a carrier medium is a "substance" containing a detectable amount of LSD. But the rule of lenity is a tie-breaker. It comes into play only when a criminal statute remains ambiguous after its text, purpose, and legislative history are considered; it neither allows the infusion of ambiguity where none exists nor entails a preference for treating wrongdoers leniently. See, e.g., Russello v. United States, 464 U.S. 16, 29 (1983); Albernaz v. United States, 450 U.S. 333, 342-343 (1981). Here, as every court of appeals to address this question has held, the language of the statute and the Sentencing Guidelines plainly directs the inclusion of the weight of any carrier medium that contains a detectable amount of LSD, and the legislative history of the statute does not undermine that conclusion in any way. There is no occasion to resort to the rule of lenity in such circumstances.

in undiluted form"; instead, "[t]he active agent is combined with inactive ones." United States v. Rose, 881 F.2d 386, 388 (7th Cir. 1989). LSD is no exception. As has been noted, "[t]he pure chemical compound of LSD is extremely potent -- far too potent to be of any use to those who would ingest it. It is therefore necessary to dilute the solid LSD and convert it into an easily ingestible form." United States v. Bishop, 894 F.2d at 985 (quoting United States v. Marshall, 706 F. Supp. at 652). Thus, to be ingested, tiny amounts of LSD must be infused onto a carrier medium -- blotter paper in the vast majority of instances, Pet. App. 4A-5A -- which is then ingested along with the drug. See United States v. Bishop, 894 F.2d at 985; United States v. Rose, 881 F.2d at 388. See also Pet. App. 7A-8A (because "the LSD solidifies inside the paper rather than on it[,] * * * [o]rdinary parlance calls the paper containing tiny crystals of LSD a mixture" since "[y]ou cannot pick a grain of LSD off the surface of the paper"). Hence, "LSD 'carriers' serve precisely the same function as the more familiar 'cutting agents' which are typically used with other drugs -- and which are to be counted * * * in determination of sentences that are inherently dependent on the 'quantities of drugs involved.'" United States v. Daly, 883 F.2d at 318. Since Congress certainly recognized that a carrier medium "serves the purpose of making the LSD ready for retail sale and ingestion," it "intended the weight of the carrier to be included" in calculating the weight of any "mixture or substance" containing a detectable

amount of LSD. United States v. Bishop, 894 F.2d at 985; see also United States v. Elrod, 898 F.2d at 62.

2. Petitioners seek to avoid the plain language of the statute by arguing that it is arbitrary and irrational to include the weight of the carrier medium in calculating the weight of a substance containing a detectable amount of LSD because the weight of the substance -- and, hence, the indicated penalty range -- will vary greatly depending on the weight of the carrier medium. Since carrier mediums are an indispensable ingredient in the retail sale of LSD, it was, as the en banc majority recognized, hardly irrational for Congress and the Sentencing Commission "to design a schedule of penalties based on that tool of the trade." Pet. App. 11A. Moreover, it is the offender who selects the carrier medium that will affect the potential length of his sentence, with full warning as to what those penalties might be. Id. at 12A. In any event, "[a] lighter carrier than paper * * * is hard to imagine." United States v. Rose, 881 F.2d at 388. Nor is it easy to imagine a more common carrier medium. See Pet. App. 9A, 11A-12A.[5/] Thus, petitioners "are in no position to complain" that the statute and the Guidelines are unconstitutional as applied to them,

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[5/] As the en banc majority stated:

> [Petitioners'] arguments [see Pet. 23-24] are not so much about the sentences handed out for LSD in blotter paper as they are objections to the possibility that other persons will receive sentences much too long (LSD in orange juice) or too short ([LSD] in pure form). But these are only possibilities, which have nothing to do with these sentences. [Petitioners'] sentences bear rational relations to their offenses.

simply because higher penalties might be imposed on potential dı traffickers who might select heavier and less common carrie. mediums. Pet. App. 12A.

Because of its extremely high potency and dangerous effects, Congress in enacting the controlled substance statute and the Sentencing Commission in promulgating the Guidelines assigned severe penalty ranges for offenses involving relatively small amounts of LSD. That determination was not irrational. The substance in this case, made from much less than one gram of pure LSD, was sufficient to provide 1,000 dosage units of LSD. In short, petitioners were precisely the kind of significant LSD traffickers that both the statute and the Sentencing Guidelines sought to punish as severely as offenders who traffic in substantial quantities of heroin, cocaine, or other dangerous drugs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

NOVEMBER 1990

No. 90-5744

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioners, Richard L. Chapman, John M. Schoenecker, and Patrick Brumm, ask leave to file the accompanying petition for writ of certiorari, without prepayment of costs and to proceed *in forma pauperis*. No affidavit is attached, inasmuch as the U.S. District Court and the U.S. Court of Appeals for the Seventh Circuit appointed each counsel designated below for the petitioners under the Criminal Justice Act of 1964.

Dated: September 11, 1990.

T. Christopher Kelly
Attorney for petitioner
Richard L. Chapman

FOR:

P. Scott Hassett
Attorney for petitioner
John M. Schoenecker

Stephen J. Eisenberg
Attorney for petitioner
Patrick Brumm

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

v.

UNITED STATES OF AMERICA,

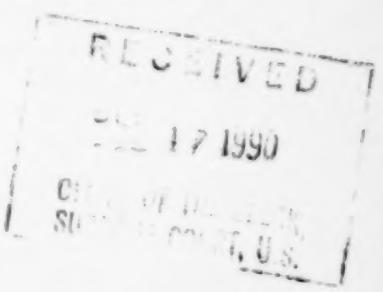
Respondent.

CERTIFICATE OF SERVICE

I certify that I am the Attorney for petitioner Richard L. Chapman, and that on September 13, 1990, I served a copy of the accompanying *Petition for Writ of Certiorari* and *Motion for Leave to Proceed In Forma Pauperis* on all parties required to be served by placing the copies in envelopes with adequate first class postage affixed, and by depositing the envelopes, addressed as follows, in the U.S. Mail:

Solicitor General
Department of Justice
Washington, D.C. 20530

John Vaudreuil
Asst. U.S. Attorney
120 North Henry Street, Room 420
Madison, Wisconsin 53703



T. Christopher Kelly
Attorney for petitioner
Richard L. Chapman

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SUPREME COURT, U.S.

No. 90-5744

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

T. CHRISTOPHER KELLY
(Appointed by this Court)
KELLY LAW OFFICES
121 South Hamilton Street
Madison, Wisconsin 53703
(608) 255-6607
Counsel for Petitioners

KENNETH W. STARR
Solicitor General
of the United States
PAUL J. LARKIN, JR.
Assistant to the
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-4132
Counsel for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1990
CERTIORARI GRANTED DECEMBER 10, 1990

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LIST OF RELEVANT DOCKET ENTRIES

Date	Document
April 20, 1989	Complaint (R. 1)
May 1, 1989	Transcript of preliminary examination (R. 5)
May 3, 1989	Indictment (R. 23)
May 18, 1989	Defendant Chapman's motion to dismiss the indictment (R. 51)
May 30, 1989	Memorandum in support of Chapman's motion to dismiss the indictment (R. 61)
May 30, 1989	Affidavit of T. Christopher Kelly in support of motion to dismiss the indictment (R. 62)
June 6, 1989	Government's brief in opposition to defendant Chapman's motion to dismiss the indictment (R. 65)
June 9, 1989	Defendant Chapman's reply memorandum in support of motion to dismiss the indictment (R. 69)
July 12, 1989	Motion of Defendant Brumm to adopt defendant Chapman's motion to dismiss indictment (R. 85)
July 12, 1989	Affidavit of Stephen J. Eisenberg regarding motion of defendant Brumm to adopt defendant Chapman's motion to dismiss the indictment (R. 86)
July 20, 1989	Report and recommendation that defendant Chapman's motion to dismiss the indictment be denied (R. 90)
July 21, 1989	Letter from Attorney Hassett adopting defendant Chapman's motion to dismiss indictment on behalf of defendant Schoenecker (R. 91)
August 4, 1989	Order adopting Magistrate's report and recommendation and denying all defendants' motions to dismiss (R. 94)

Date	Document
October 4, 1989	Defendant Brumm's motion for order declaring 21 U.S.C. sec. 841 mandatory minimum sentence for LSD violates the due process and equal protection clauses of the U.S. Constitution (R. 102)
October 4, 1989	Memorandum of law in support of docket number 102 (R. 103)
October 4, 1989	Defendant Chapman's motion challenging applicability of mandatory minimum sentence and sentencing guidelines at sentencing (R. 104)
October 4, 1989	Defendant Chapman's memorandum in support of motion challenging applicability of mandatory minimum sentence and sentencing guidelines at sentencing (R. 105)
October 6, 1989	Defendant Schoenecker's motion challenging applicability of mandatory minimum sentence and sentencing guidelines at sentencing (R. 106)
October 12, 1989	Defendant Brumm's motion to adopt co-defendants' sentencing motions (R. 107)
October 16, 1989	Order that defendants' motions to declare sentencing guidelines and 21 U.S.C. sec. 841 unconstitutional as applied to distribution of LSD are denied (R. 108)
October 20, 1989	Judgment of conviction — defendant Brumm (R. 112)
October 24, 1989	Judgment of conviction — defendant Schoenecker (R. 113)
October 24, 1989	Judgment of conviction — defendant Chapman (R. 114)
October 30, 1989	Transcript of sentencing—defendant Brumm (R. 117)
November 6, 1989	Transcript of sentencing—defendant Chapman (R. 120)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 89 M-44

UNITED STATES OF AMERICA

v.

PATRICK D. BRUMM, RICHARD L. CHAPMAN,
and JOHN M. SCHOENECKER,
Defendants.

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 21 SECTION 841(a)(1)

Before Honorable James Groh
United States Magistrate
120 North Henry Street
Madison, WI 53703

The undersigned complainant being duly sworn states: That on or about April 19, 1989, in the Western District of Wisconsin, the defendants PATRICK D. BRUMM, RICHARD L. CHAPMAN, and JOHN M. SCHOENECKER, knowingly and intentionally distributed a Schedule I controlled substance, that is, approximately five grams of lysergic acid diethylamide.

And the complainant states that this complaint is based on the attached affidavit.

/s/ Allen M. Rickey
ALLEN M. RICKEY
Detective
Metro Narcotics Unit

Sworn to before me, and subscribed in my presence, April 20, 1989.

/s/ James Groh
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Caption Omitted in Printing)

AFFIDAVIT

STATE OF WISCONSIN)
ss.
COUNTY OF DANE)

Allen M. Rickey, being duly sworn on oath, deposes and states as follows:

1. I am a detective employed by the City of Madison Police Department. I have been so employed for approximately ten years. For a total of five years I have been assigned to the Dane County Metro Narcotics & Vice Unit. In my capacity as a detective with the Metro Drug Unit I am responsible for conducting investigations of possible violations of the controlled substance laws in Dane County.

2. On April 17, 1989, at my direction as the case detective, Police Officer Dan Roman, operating in an undercover capacity, spoke on the telephone with Richard Chapman. Officer Roman discussed with Mr. Chapman the purchase of LSD by Roman from Chapman. Chapman told Roman that he would have been able to provide "20", referring to 20 sheets or approximately 2,000 hits of LSD, on the weekend of April 15 and April 16, 1989. Chapman stated that his source was now out of town. Chapman and Officer Roman made plans to meet on Wednesday, April 19, 1989, at the Badger Bowl in the Town of Madison, Wisconsin, at approximately 5:30 p.m. to conduct the LSD sale.

3. At approximately 5:45 p.m. on April 19, 1989, Officer Roman went to the Badger Bowl in the Town of Madison, Wisconsin, and met Richard Chapman at the main bar. Chapman told Roman that Chapman would need a ride to the Kohl's grocery store on Park Street to pick up the LSD. Chapman said that the "guy's over at Kohl's because he was doing a deal over there." Chapman also said he could only get 1,000 hits of LSD and that the price would be $1,750.00. Roman asked Chapman why the price had gone up and Chapman stated that the price had gone up because they had to pay $175.00 extra for the LSD because it was being "fronted" to them. Officer Roman told Chapman that he (Roman) would have to pick up the money and Chapman said he would take a cab to the Kohl's parking lot and meet with his guy. Chapman told Roman that he also had available orange microdots, a varity of LSD. Chapman said these were cheaper per hit than the "paper", referring to the blotter paper LSD which Officer Roman was arranging to purchase. Chapman told Roman he would have to get in touch with "these guys" and then he would page Officer Roman. They agreed to meet at the bar at the Badger Bowl in approximately one hour and to conduct the purchase in Officer Roman's car.

4. Chapman was observed by various officers from the Metro Narcotics Unit as he entered a cab at the Badger Bowl parking lot and traveled in that cab to the Kohl's store on South Park Street in Madison. Detective Richard Pharo observed Chapman arrive at approximately 6:23 p.m. on April 19. Chapman got out of the cab and made contact with a white male later identified as John Schoenecker. Detective Pharo observed Chapman and Schoenecker standing next to a brown van bearing Wisconsin registration AC48-442. Department of Transportation records were checked and those records revealed that that license plate is registered to a vehicle owned by Patrick D. Brumm.

5. Between 6:27 p.m. and approximately 6:33 p.m., on April 19, Detectives Linda Draeger and Dick Hartwig conducted surveillance on this van as it traveled from the Kohl's store to the parking lot of the Badger Bowl. Officer Tony Peterson saw the van pull up to Schoenecker's brown Honda also parked in the Badger Bowl parking lot. John Schoenecker was then seen entering the brown van. Chapman was observed by Officer Peterson leaving the van approximately one minute later. At approximately 6:57 p.m., Chapman, Schoenecker and Brumm were seen sitting together in the bar area at the Badger Bowl by Sergeant Mark Bradley.

6. At approximately 7:00 p.m. on April 19, Officer Roman arrived at the Badger Bowl. As he pulled into the parking lot he observed John Schoenecker driving in the area of the Badger Bowl. Officer Roman went into the bar where he met with Richard Chapman. Chapman told Roman that the LSD was a different pattern from that LSD which Roman had purchased previously. Chapman told Roman that John, referring to John Schoenecker, was in the area. Chapman and Roman then left the bar and went to Roman's car in the parking lot. Roman showed Chapman the $1,750.00 in prerecorded U.S. currency and Chapman began walking toward the north side of the Badger Bowl complex. Roman sat in his car and saw John Schoenecker drive back into the parking lot and drive towards the north side of the complex, the same location where Chapman was walking. Approximately two minutes later, Chapman returned to Roman's car. Chapman handed Roman a white envelope. Roman opened the envelope and saw approximately 1,000 hits of blotter-type LSD. This LSD was consistent with LSD Officer Roman has observed in the past in his professional capacity. Officer Roman then handed Chapman the $1,750.00 in prerecorded currency. Officer Roman got out of his car, telling Chapman that he was going to put the LSD in the trunk. Chapman got out of the car and began walking away from the car.

7. Officer Tony Peterson watched Chapman meet John Schoenecker at the southside entrance of the Badger Bowl. Officer Peterson saw Chapman and Schoenecker enter the Badger Bowl. Approximately one minute later, Officer Peterson saw Chapman and Schoenecker leave the Badger Bowl. They were with a third white male. All three individuals walked to Patrick D. Brumm's brown van. Chapman and Schoenecker were seen a short while later leaving the area of Brumm's van.

8. Within a few minutes, Chapman and Schoenecker were seen driving in Schoenecker's car on East Badger Road. I assisted in the arrest of Chapman and Schoenecker at that time. Detective Pharo took custody of John Schoenecker. Detective Pharo searched Schoenecker and recovered over $850.00 in U.S. currency. $850.00 was segregated in one of Schoenecker's pockets. Detective Pharo compared the serial numbers on the $850.00 taken from Schoenecker and these serial numbers matched exactly the serial numbers on the currency provided by Officer Roman to Richard Chapman in payment for the LSD.

9. At approximately the same as I was participating in the arrest of Schoenecker and Chapman, Detective David Mahoney, Special Agent Jerry Becka of the Drug Enforcement Administration, and Detective Linda Draeger stopped the brown van and arrested Patrick D. Brumm. Detective Mahoney searched Patrick Brumm and recovered over $2,000.00 in U.S. currency. Detective Mahoney compared the serial numbers of these bills to the serial numbers of the currency provided by Officer Roman to Richard Chapman. The serial numbers on a total of $900 matched exactly the serial numbers on the currency provided by Officer Roman to Richard Chapman for the LSD.

10. I conducted a field test on several samples from the substance sold to Officer Roman. All of these samples

tested positive for the presence of LSD. The LSD weighed approximately 5.7 grams.

11. This affidavit is based on my own personal observation as well as the personal observations described to me, either orally or by report, by Officer Dan Roman, Detective Richard Pharo, Officer Tony Peterson, Detective David Mahoney, Sergeant Mark Bradley, Detective Linda Draeger, Sergeant Dick Hartwig and Special Agent Jerry Becka. I believe the information provided to me by these law enforcement officers is reliable because they were providing information to me in the course of their official duties and because they have all provided me truthful, reliable information in the past. This affidavit is also based on information I received from the Wisconsin Department of Transportation. I believe that information is reliable because those records are official government records which I have checked on countless occasions in the past and have always found to be reliable.

/s/ Allen M. Rickey
ALLEN RICKEY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Caption Omitted in Printing)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

On or about April 19, 1989, in the Western District of Wisconsin, the defendants,

PATRICK D. BRUMM,
RICHARD L. CHAPMAN,
AND JOHN M. SCHOENECKER,

knowingly and intentionally distributed a Schedule I controlled substance, that is, approximately five grams of lysergic acid diethylamide.

(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2).

A TRUE BILL

/s/ Vance L. Sinclair
Foreman

/s/ Patrick J. Fiedler
PATRICK J. FIEDLER
United States Attorney

Indictment returned: May 3, 1989.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

(Caption Omitted in Printing)

DEFENDANT CHAPMAN'S MOTION CHALLENGING APPLICABILITY OF MANDATORY MINIMUM SENTENCE AND SENTENCING GUIDELINES AT SENTENCING

NOTICE OF MOTION

TO: John Vaudreuil
Asst. U.S. Attorney
120 N. Henry St.
Madison, Wisconsin 53703

PLEASE TAKE NOTICE that the following motion will be brought before the U.S. District Court for the Western District of Wisconsin, Hon. Barbara B. Crabb, presiding, at the Federal Courthouse in Madison, Wisconsin, at a time and date to be set by the court.

MOTION CHALLENGING APPLICABILITY OF MANDATORY MINIMUM SENTENCE AND SENTENCING GUIDELINES AT SENTENCING

Defendant, Richard L. Chapman, moves the court as follows:

1. For an Order declaring the mandatory five year minimum sentence provided by 21 U.S.C. sec. 841(b)(1)(B)(v) to be an unconstitutional violation of defend-

ant's right to due process of law, and to the equal protection of the laws, as guaranteed by the Fifth Amendment to the United States Constitution. Defendant moves the court to sentence defendant without regard to the mandatory minimum sentence.

2. For an Order declaring section 2D1.1 of the Federal Sentencing Guidelines to be unconstitutional as applied to LSD in that the guidelines, which base the offense level upon the weight of the carrier that contains the LSD, violate the defendant's right to due process of law and to equal protection of the laws as guaranteed by the Fifth Amendment to the United States Constitution. Defendant moves the court to sentence defendant without regard to the weight of the blotter paper that carried the LSD, and to apply the guidelines to the weight of the LSD alone, as determined from the Dosage Equivalency Table appended to section 2D1.1.

This motion is based upon the parties' stipulation of facts as set forth in the attached letter from Assistant U.S. Attorney John W. Vaudreuil dated September 11, 1989.

The grounds for this motion are more fully stated in the accompanying memorandum.

Dated: October 4, 1989.

/s/ T. Christopher Kelly
T. CHRISTOPHER KELLY
Attorney for defendant
Richard L. Chapman
121 South Hamilton Street
Madison, Wisconsin 53703
608/255-6607

U.S. DEPARTMENT OF JUSTICE

United States Attorney
Western District of Wisconsin

September 11, 1989

Mr. T. Christopher Kelly
Attorney at Law
121 South Hamilton St.
Madison, WI 53703

Re: *United States v. Chapman, Brumm, and Schoenecker*
Case No. 89-CR-46-C

Dear Mr. Kelly:

This letter is written in response to your letter of September 5, 1989. I am willing to agree, for the purpose of sentencing and appeal, that the weight of the LSD distributed in this case, apart from the weight of the blotter paper, was less than one gram. I am also willing to agree that LSD is commonly sold by the "hit" without regard to the weight of the carrier that contains that dosage.

Very truly yours,

PATRICK J. FIEDLER
United States Attorney

By: /s/ John W. Vaudreuil
JOHN W. VAUDREUIL
Assistant U.S. Attorney

JWV:njt

cc: Mr. Stephen J. Eisenberg
Attorney at Law
121 East Wilson St.
Madison, WI 53703

Mr. Scott Hassett
Attorney at Law
214 West Mifflin St.
Madison, WI 53703

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Caption Omitted in Printing)

ORDER

These defendants all face sentencing for violation of 21 U.S.C. § 841, which sets a minimum five-year sentence as the penalty for distribution of "1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." 21 U.S.C. § 841 (b)(1)(B)(v).

Each defendant has been convicted of distributing 1000 doses, or "hits," of LSD. Each hit consisted of one square of special blotter paper that had been saturated with an LSD-alcohol mixture. (According to defendants, LSD is so potent in its pure form that it is commonly mixed with alcohol and the resulting mix is so unstable it can only be captured and conveyed by putting a spot of it onto a medium such as blotter paper, sugar cubes, gelatin, or candy.)

Calculating the weight of the LSD (less than one gram), together with the weight of the blotter paper (5.7 grams), puts each defendant in a sentencing guideline range of 120 to 150 months, and subjects each of them to the mandatory minimum term of five years provided under § 841. The government has agreed that it will recommend a downward departure from the guideline range, pursuant to Section 5K1.1 of the Sentencing Guidelines, but will not recommend a sentence below the mandatory five year minimum.

Defendants have moved to have the court declare unconstitutional both the statutory minimum mandatory sentence and the Sentencing Guidelines. They contend that the penalties set forth under the statute and the guidelines violate the due process clause of the United States Constitution because they are arbitrary and capricious and bear no reasonable relationship to a proper legislative purpose. They contend also that the penalties violate the equal protection clause, which requires that classifications made by a statute be reasonable in light of the statute's purpose.

It is defendants' position that the goal of drug trafficking legislation is to provide harsher penalties for possession or distribution of larger quantities of illicit drugs, and therefore, in a rational system, the potential punishment would increase as the quantity of drugs increased. Given the manner in which LSD is distributed, however, there is no natural relationship between the weight of the drug distributed and the penalties because the weight of the drug increases depending on the weight of the medium used to distribute it and not necessarily on the amount of drug being distributed. Defendants point out that under the present statute, possession of a vial containing 50 liquid milligrams of LSD would expose a person to lesser penalties than would possession of the same amount of LSD mixed with alcohol and put into sugar cubes or onto blotter paper.

In a recent decision, *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989), the Court of Appeals for the Seventh Circuit held both that blotter paper was a "substance or mixture containing a detectable amount of [LSD]," and that the widely varying penalties set for different substances under 21 U.S.C. § 841 were not irrational and did not violate the equal protection clause. The court of appeals made it clear that it is not the courts' role to second-guess such congressional determi-

nations as the one challenged by defendant Rose, that LSD is 100,000 times more dangerous than marijuana, as the minimum mandatory penalty structure in § 841 suggests. "The Constitution has not been interpreted to require that the pattern of punishments for different federal crimes compose a harmonious whole." *Id.* at 388.

Defendants contend that the due process and equal protection arguments they are raising in this case were neither raised nor addressed in *Rose*, and remain open for consideration. However, it appears that, in deciding that blotter paper was a mixture or substance within the meaning of § 841, the court of appeals decided that it was not irrational to calculate sentences based on the weight of the mixture rather than upon the weight of the pure LSD, and that, in holding constitutional the apparent irrationalities in the federal criminal code, the court forestalled any argument based upon the apparent irrationality of basing criminal penalties upon the weight of the carrier of the LSD.

In any event, even if the questions were still open, I would decide against defendants. Their arguments are compelling, but they are addressed to the wrong forum. It is Congress to whom they should be appealing to change the penalty structure of § 841.

On its face, the penalty provision for LSD suggests that Congress was aware of the fact that the drug is not sold in its pure form but in mixtures or dissolved in another substance. The statute imposes a minimum term of imprisonment for a violation involving "1 gram or more of a *mixture or substance* containing a detectable amount of lysergic acid diethylamide (LSD)." It is inevitable that the "mixtures or substances" containing a detectable amount of LSD would vary in weight. Congress could have avoided any resulting unfairness by specifying that the weight of the pure LSD would con-

trol the determination of the penalty but it did not. Presumably, it wanted to impose heavy penalties on the transportable form of the drug, since it was in that form that it posed the greatest danger. It was not irrational for Congress to make that choice or, having made it, to decline to provide separate penalties for every possible medium in which the drug might be distributed.

Defendants argue that LSD is a special case. They maintain that it is rational to raise penalties as weights increase when setting penalties for the sale of other drugs, such as cocaine, but that it is not rational to do so for LSD. However, minimum mandatory penalties and sentencing guidelines are set for other drugs without consideration of the purity of the drug or the proportion of the weight of the drug to the weight of the mixture containing the drug. For example, cocaine is rarely sold in its pure form; it is frequently mixed with other substances such as corn starch or Inositol. Under both the statute and the sentencing guidelines, persons who sell 500 grams of heavily cut cocaine can be subjected to the same penalties as persons who sell 500 grams of pure cocaine. (Under the sentencing guidelines a person can be given an "enhancement" if the cocaine he has sold is of greater purity; otherwise the same penalties prevail.) That this is so may seem irrational, and might even be irrational in a perfect world, but it reflects both an appreciation of the dangers of wide distribution of illicit drugs and the difficulties of trying to legislate for all of the possible permutations of drug packaging and sales techniques.

I conclude that defendants have failed to show that subjecting them to penalties under the statute or under the sentencing guidelines based on the combined weight of the carrier and of the LSD itself is a violation of their federal constitutional rights to due process and to equal protection of the laws.

ORDER

IT IS ORDERED that defendants' motions to have the court declare the sentencing guidelines and 21 U.S.C. § 841 unconstitutional as they apply to the distribution of LSD are DENIED.

Entered this 13th day of October, 1989.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Case No. 89-CR-046-C-01

UNITED STATES OF AMERICA

v.

PATRICK D. BRUMM

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

STEVE EISENBERG, Defendant's Attorney

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC § 841(a)(1)	Distribute Schedule 1-Lysergic Acid Diethylamide (LSD)	
18 USC § 2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).

( ) Count(s) [ ]
(is) (are) dismissed on the motion of the United States.

( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

(X) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[390-50-2987]

Defendant's mailing address:
[1239 Spaight Street]
[Madison, WI 53703

Defendant's residence address:
[1239 Spaight Street]
[Madison, WI 53703]

[October 19, 1989]
Date of Imposition of Sentence

/s/ Barbara B. Crabb

Signature of Judicial Officer

[BARBARA B. CRABB
U.S. District Judge]
Name and Title of Judicial Officer

October 20, 1989

Date

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has selected to depart downward from the guidelines based on the defendant's substantial assistance to authorities. The court is also of the opinion that the sentence imposed here is more than sufficient to comply with the purposes of sentencing as set forth in 18 USC § 3553. The sentence provides more than adequate punishment, deterrence and protection of the public from further criminal acts on the part of the defendant.

As to the one-count Indictment, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 60 months to be followed by a four-year term of supervised release. As a special condition of supervised release, the defendant is to abstain from illegal drug use, sales, and associations, and is to participate in a program of drug counseling and urine surveillance as directed by the supervising U.S. probation officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/ SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC § 922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impede the defendant's abilities to support himself upon release.

The order of the Magistrate dated April 20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until November 27, 1989, between the hours of 10:00 AM and noon when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on November 27, 1989. It is further ordered that the present conditions of release are continued until November 27, 1989.

The defendant shall surrender to the United States Marshal for this district

[ ] between the hours of — and — on —.

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on — to — at —, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Case No. 89-CR-046-C-03

UNITED STATES OF AMERICA

v.

JOHN M. SCHOENECKER

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC § 841(a)(1)	Distribute Schedule 1-Lysergic Acid Diethylamide (LSD)	One
18 USC § 2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).

( ) Count(s) [ ]
(is) (are) dismissed on the motion of the United States.

( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

(X) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[392-70-9669]

Defendant's mailing address:
[Rock County Jail]
[Janesville, WI 53545]

Defendant's residence address:
[Rock County Jail]
[Janesville, WI 53545]

[October 19, 1989]
Date of Imposition of Sentence

/s/ Barbara B. Crabb

Signature of Judicial Officer

[BARBARA B. CRABB
U.S. District Judge]
Name and Title of Judicial Officer

October 20, 1989

Date

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has selected a term at the lower end of the guideline range because the court is of the opinion that the sentence is sufficient to comply with the purposes of sentencing as set forth in 18 USC § 3553. The sentence provides more than adequate punishment, deterrence and protection of the public from further criminality on the part of the defendant.

As the one-count Information, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 63 months to be followed by a four-year term of supervised release. As a special condition of supervised release, the defendant is to abstain from illegal drug use, sales, and associations, and is to participate in a program of drug counseling and urine surveillance as directed by the supervising U.S. probation officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/ SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC § 922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impair the defendant's abilities to support himself upon release. The order of the Magistrate dated April

20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until — between the hours of — and — when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on —. It is further ordered that the present conditions of release are continued until —.

The defendant shall surrender to the United States Marshal for this district

[ ] between the hours of — and — on —.

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on — to — at —, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Case No. 89-CR-046-C-02

UNITED STATES OF AMERICA

v.

RICHARD L. CHAPMAN

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

T. CHRISTOPHER KELLY, Defendant's Attorney

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC § 841(a)(1)	Distribute Schedule I-Lysergic Acid Diethylamide (LSD)	One
18 USC § 2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).

( ) Count(s) [ ]
(is) (are) dismissed on the motion of the United States.

( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

(X) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[396-62-0623]

Defendant's mailing address:
[Rock County Jail]
[Janesville, WI 53545]

Defendant's residence address:
[Rock County Jail]
[Janesville, WI 53545]

[October 19, 1989]
Date of Imposition of Sentence

/s/ Barbara B. Crabb

Signature of Judicial Officer

[BARBARA B. CRABB
U.S. District Judge]
Name and Title of Judicial Officer

October 20, 1989

Date

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has elected to depart downward from the guidelines based on the defendant's substantial assistance to authorities. The sentence should provide adequate punishment, deterrence and protection of the public from further criminality on the part of the defendant.

As to the one-count Information, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 96 months to be followed by a five-year term of supervised release. As special conditions of supervised release: 1) the defendant is to abstain from the use of alcohol and from illegal drug use, sales, and associations, and to participate in a program of counseling and urine surveillance as directed by the supervising U.S. Probation officer; 2) the defendant is to participate in outpatient mental health counseling as directed by the supervising U.S. Probation Officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/ SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC § 922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impair the defendant's abilities to support himself upon release. The Order of the Magistrate dated

April 20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

It is recommended that the defendant be afforded the opportunity to participate in the substance abuse treatment program at FMC-Rochester and that the last 6 months of his confinement be spent in a community corrections center (CCC).

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until between the hours of — and — when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on —. It is further ordered that the present conditions of release are continued until ———.

The defendant shall surrender to the United States Marshal for this district [ ] between the hours of — and — on —.

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on — to — at —, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 10, 1990

Before HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

No. 89-2420

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
STANLEY J. MARSHALL,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois,
Springfield Division
No. 88 CR 30051—Richard Mills, *Judge*

Nos. 89-3364, 89-3390, 89-3391

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER,
and PATRICK BRUMM,
Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Wisconsin
No. 889 CR 46—Barbara B. Crabb, *Chief Judge*

ORDER

The court has ordered *sua sponte* that these cases shall be heard *en banc*, on May 30, 1990.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 89-2420, 89-3364, 89-3390 and 89-3391

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

STANLEY J. MARSHALL,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,
Defendants-Appellants.

Argued Jan. 22, 1990, and April 18, 1990

Reargued In Banc May 30, 1990

Decided July 17, 1990

Rehearing and Rehearing En Banc

Denied Sept. 10, 1990

Before BAUER, Chief Judge, and CUMMINGS, WOOD, Jr., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Two cases consolidated for decision in banc present three questions concerning the application and constitutionality of the statute and sentencing guidelines that gov-

ern sales of lysergic acid diethylamide (LSD). Stanley J. Marshall was convicted after a bench trial and sentenced to 20 years' imprisonment for conspiring to distribute, and distributing, more than ten grams of LSD, enough for 11,751 doses. 706 F.Supp. 650. Patrick Brumm, Richard L. Chapman, and John M. Schoenecker were convicted by a jury of selling ten sheets (1,000 doses) of paper containing LSD. Because the total weight of the paper and LSD was 5.7 grams, a five-year mandatory minimum applied. The district court sentenced Brumm to 60 months (the minimum), Schoenecker to 63 months, and Chapman to 96 months' imprisonment. All four defendants confine their arguments on appeal to questions concerning their sentences.

The three questions we must resolve are these: (1) Whether 21 U.S.C. § 841(b)(1)(A)(v) and (B)(v), which set mandatory minimum terms of imprisonment—five years for selling more than one gram of a "mixture or substance containing a detectable amount" of LSD, ten years for more than ten grams—exclude the weight of a carrier medium. (2) Whether the weight tables in the sentencing guidelines likewise exclude the weight of any carrier. (3) Whether the statute and the guidelines are unconstitutional to the extent their computations are based on anything other than the weight of the pure drug. Marshall presents some additional questions concerning his sentence that are important only if we get past these three.

I

According to the Sentencing Commission, the LSD in an average dose weighs 0.05 milligrams. Twenty thousand pure doses are a gram. But 0.05 mg is almost invisible, so LSD is distributed to retail customers in a carrier. Pure LSD is dissolved in a solvent such as alcohol and sprayed on paper or gelatin; alternatively the paper may be dipped in the solution. After the solvent evaporates, the paper or gel is cut into one-dose squares and sold by

the square. Users swallow the squares or may drop them into a beverage, releasing the drug. Although the gelatin and paper are light, they weigh much more than the drug. Marshall's 11,751 doses weighed 113.32 grams; the LSD accounted for only 670.72 mg of this, not enough to activate the five-year mandatory minimum sentence, let alone the ten-year minimum. The ten sheets of blotter paper carrying the 1,000 doses Chapman and confederates sold weighed 5.7 grams; the LSD in the paper did not approach the one-gram threshold for a mandatory minimum sentence. This disparity between the weight of the pure LSD and the weight of LSD-plus-carrier underlies the defendants' arguments.

A

If the carrier counts in the weight of the "mixture or substance containing a detectable amount" of LSD, some odd things may happen. Weight in the hands of distributors may exceed that of manufacturers and wholesalers. Big fish then could receive paltry sentences or small fish draconian ones. Someone who sold 19,999 doses of pure LSD (at 0.05 mg per dose) would escape the five-year mandatory minimum of § 841(b)(1)(B)(v) and be covered by § 841(b)(1)(C), which lacks a minimum term and has a maximum of "only" 20 years. Someone who sold a single hit of LSD dissolved in a tumbler of orange juice could be exposed to a ten-year mandatory minimum. Retailers could fall in or out of the mandatory terms depending not on the number of doses but on the medium: sugar cubes weigh more than paper, which weighs more than gelatin. One way to eliminate the possibility of such consequences is to say that the carrier is not a "mixture or substance containing a detectable amount" of the drug. Defendants ask us to do this.

Defendants' submission starts from the premise that the interaction of the statutory phrase "mixture or substance" with the distribution of LSD by the dose in a carrier creates a unique probability of surprise results.

The premise may be unwarranted. The paper used to distribute LSD is light stuff, not the kind used to absorb ink. Chapman's 1,000 doses weighed about 0.16 ounces. More than 6,000 doses, even in blotter paper, weigh less than an ounce. Because the LSD in one dose weighs about 0.05 milligrams, the combination of LSD-plus-paper is about 110 times the weight of the LSD. The impregnated paper could be described as "0.9% LSD".[1] Gelatin carrying LSD could be described as "2.5% LSD", if the weight for gelatin given in *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir.1987), is accurate.

This is by no means an unusual dilution rate for illegal drugs. Heroin sold on the street is 2% to 3% opiate and the rest filler. Jerome J. Platt, *Heroin Addition: Theory, Research, and Treatment* 48-50 (1986). Sometimes the mixture is even more dilute, approaching the dilution rate for LSD in blotter paper. E.g., *United States v. Buggs*, 904 F.2d 1070, 1072 (7th Cir.1990), (conviction for sale of 9.95 grams of 1.2% heroin). Heroin and crack cocaine, like LSD, are sold on the streets by the dose, although they are sold by weight higher in the distributional chain. All of the "designer drugs" and many of the opiates are sold by the dose, often conveniently packaged in pills. The Sentencing Commission lists MDA, PCP, psilocin, psilocybin, methaqualone, phenmetrazine, and amphetamines (regular and meth-) along with LSD as drugs sold by the dose in very dilute form. 55 Fed.Reg. 19197 (May 8, 1990) (amending Application Note 11 to U.S.S.G. 2D1.1). Other drugs, such as dilaudid and dolaphine, are sold by the pill rather than weight,

[1] The 1,000 doses in *Chapman* weighed 5.7 grams, or 0.0057 grams per dose. The 11,751 doses in *Marshall* weighed 113.32 grams, or 0.00964 grams per dose. Marshall apparently sold premium LSD; the forensic chemist concluded that his 11,751 squares of blotter paper contained 670.72 milligrams of LSD, or 0.057 mg per dose—14% more per dose than the Sentencing Commission's norm of 0.05 mg. The substance Marshall sold was 0.59% LSD; the substance the other three sold was 0.877% LSD.

and it is safe to assume that all have far less than 100% active ingredients.

Just as it is hasty to assume that the carrier produces a unique dilution factor for LSD, so it is unwarranted to assume that LSD as it leaves the refinery is pure, and therefore weighs only 0.05 mg per dose. Solid LSD weighs that little, but is it shipped dry? Neither the record nor the sparse literature tells us. LSD is applied to a carrier in a solvent such as alcohol. How dilute is this solution? If we assume that one drop of liquid is applied to each square of blotter paper, then the liquid is only 0.1% LSD.[2] We do not know whether one drop per dose is right, but, if it is, the solution weighs 8.5 times as much per does as blotter paper: a dose of LSD in alcohol weighs 0.0487 grams, while a dose of LSD in blotter paper weighs 0.0057 grams.[3] A manufacturer caught with wholesale quantities of LSD solution that had not been applied to blotter paper would face sentences *higher* than those who possess only the paper containing the drug.

So there may be nothing extraordinary about LSD, no reason to think that the statute operates differently for LSD than for heroin. Heroin comes into this country pure; it is sold diluted on the street, creating the possibility that § 841 will require higher sentences for retailers than for smugglers or refiners. The dilution factor for retail heroin is not significantly different from the factor for LSD on blotter paper. LSD in solution weighs

[2] One drop is equivalent to one minim, or 0.06161 milliliters. That implies about 16,231 drops per liter. One liter of water weighs a kilogram. Ethyl alcohol has a specific gravity of 0.7893, so a liter of ethyl alcohol weighs 0.7893 kilograms. LSD weighs 0.05 mg per hit. So 16,231 doses of LSD weigh 0.811 grams. A liter of alcohol containing these doses weighs 790.11 grams (the 789.3 grams of alcohol plus the 0.811 grams of LSD). Thus the solution is 0.103% LSD.

[3] In *Chapman*, in which 1,000 doses weighed 5.7 grams. LSD dissolved in alcohol weighs only 5.05 times as much per dose as LSD in Marshall's heavier blotter paper (see note 1 above).

more than LSD on blotter paper; pure heroin weighs (much) less per dose than the dilute heroin sold on the street. Heroin is sold in different cities at different dilution rates; that implies that the weight of a packet of heroin for a single administration weighs more in some cities than in others. The percentage difference exceeds the gap between paper and gelatin, the common carriers of LSD. Office of Intelligence, Drug Enforcement Administration, *Domestic Monitor Program: Summary Report Fiscal Year 1989*. So although § 841 creates the possibility of erratic application in LSD cases, it is important to recognize that the normal case involves neither extreme weight (LSD in orange juice) nor extreme purity (19,999 doses weighing less than a gram). With this understanding, we turn to the statute.

B

It is not possible to construe the words of § 841 to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug. The statute speaks of "mixture or substance containing a detectable amount" of a drug. "Detectable amount" is the opposite of "pure"; the point of the statute is that the "mixture" is not to be converted to an equivalent amount of pure drug.

The structure of the statute reinforces this conclusion. The 10-year minimum applies to any person who possesses, with intent to distribute, "100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)", § 841(b)(1)(A)(iv). Congress distinguished the pure drug from a "mixture or substance containing a detectable amount of" it. All drugs other than PCP are governed exclusively by the "mixture or substance" language. Even brute force cannot turn that language into a reference to pure LSD. Congress used the same "mixture or substance" language to describe heroin, cocaine, amphetamines, and many other drugs

that are sold after being cut—sometimes as much as LSD. There is no sound basis on which to treat the words "substance or mixture containing a detectable amount of", repeated verbatim for every drug mentioned in § 841 except PCP, as *different* things for LSD and cocaine although the language is identical, while treating the "mixture or substance" language as meaning the *same* as the reference to pure PCP in 21 U.S.C. § 841(b)(1)(A)(iv) and (B)(iv).

Although the "mixture or substance" language shows that the statute cannot be limited to pure LSD, it does not necessarily follow that blotter paper *is* a "mixture or substance containing" LSD. That phrase cannot include all "carriers". One gram of crystalline LSD in a heavy glass bottle is still only one gram of "statutory LSD". So is a gram of LSD being "carried" in a Boeing 747. How much mingling of the drug with something else is essential to form a "mixture or substance"? The legislative history is silent, but ordinary usage is indicative.

"Substance" may well refer to a chemical compound, or perhaps to a drug in a solvent. LSD does not react chemically with sugar, blotter paper, or gelatin, and none of these is a solvent. "Mixture" is more inclusive. Cocaine often is mixed with mannitol, quinine, or lactose. These white powders do not react, but it is common ground that a cocaine-mannitol mixture is a statutory "mixture".

LSD and blotter paper are not commingled in the same way as cocaine and lactose. What is the nature of their association? The possibility most favorable to defendants is that LSD sits on blotter paper as oil floats on water. Immiscible substances may fall outside the statutory definition of "mixture". The possibility does not assist defendants—not on this record, anyway. LSD is applied to paper in a solvent; after the solvent evaporates, a tiny quantity of LSD remains. Because the fibers absorb the alcohol, the LSD solidifies inside the paper rather than

on it. You cannot pick a grain of LSD off the surface of the paper. Ordinary parlance calls the paper containing tiny crystals of LSD a mixture.

United States v. Rose, 881 F.2d 386 (7th Cir.1989), like every other appellate decision that has addressed the question,[4] concludes that the carrier medium for LSD, like the "cut" for heroin and cocaine, is a "mixture or substance containing a detectable amount" of the drug. Although a chemist might be able to offer evidence bearing on the question whether LSD and blotter paper "mix" any more fully than do oil and water, the record contains no such evidence. Without knowing more of the chemistry than this record reveals, we adhere to the unanimous conclusion of the other courts of appeals that blotter paper treated with LSD is a "mixture or substance containing a detectable quantity of" LSD.

C

Two reasons have been advanced to support a contrary conclusion: that statutes should be construed to avoid constitutional problems, and that some members of the sitting Congress are dissatisfied with basing penalties on the combined weight of LSD and carrier. Neither is persuasive.

A preference for giving statutes a constitutional meaning is a reason to construe, not to rewrite or "improve".

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[4] *United States v. Daly*, 883 F.2d 313 (4th Cir.1989); *United States v. Taylor*, 868 F.2d 125 (5th Cir.1989); *United States v. Elrod*, 898 F.2d 60 (6th Cir.1990); *United States v. Bishop*, 894 F.2d 981 (8th Cir.1990); *United States v. Larsen*, 904 F.2d 562 (10th Cir.1990). See also *United States v. Skelton*, 901 F.2d 1204, 1206 (4th Cir.1990) (although "Congress has drawn a distinction between pure PCP and PCP mixtures, it has not drawn a like distinction with respect to PCPy or any other hallucinogen"; holding that the full weight of a PCPy mixture counts, even though PCPy is a close chemical relation to PCP); *Tennessee v. Elphee*, 1989 WL 19159, 1989 Tenn.Cr.App. LEXIS 163 at 9-10 (weight of blotter paper counted under state law identical to § 841).

E.g., *United States v. Monsanto*, —— U.S. ——, 109 S.Ct. 2657, 2664, 105 L.Ed.2d 512 (1989); *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed.2d 536 (1985). Canons are doubt-resolvers, useful when the language is ambiguous and "a construction of the statute is *fairly possible* by which the question may be avoided", *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296-97, 76 L.Ed. 598 (1932) (emphasis added). "[S]ubstance or mixture containing a detectable quantity" is not ambiguous, avoidance not "fairly possible". Neither the rule of lenity nor the preference for avoiding constitutional adjudication justifies disregarding unambiguous language.

The canon about avoiding constitutional decisions, in particular, must be used with care, for it is a closer cousin to invalidation than to interpretation. It is a way to enforce the constitutional penumbra, and therefore an aspect of constitutional law proper. Constitutional decisions breed penumbras, which multiply questions. Treating each as justification to construe laws out of existence too greatly enlarges the judicial power. And heroic "construction" is unnecessary, given our conclusion in Part III that Congress possesses the constitutional power to set penalties on the basis of gross weight.

As for the pending legislation: subsequent debates are not a ground for avoiding the import of enactments. E.g., *Pierce v. Underwood*, 487 U.S. 552, 566-68, 108, S.Ct. 2541, 2550-52, 101 L.Ed.2d 490 (1988); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733-34 & n. 14, 97 S.Ct. 2061, 2068-69 & n. 14, 52 L.Ed.2d 707 (1977); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132, 95 S.Ct. 335, 352-53, 42 L.Ed.2d 320 (1974). Although the views of a subsequent Congress are entitled to respect, ongoing debates do not represent the views of Congress. Judge Wilkins, Chairman of the Sentencing Commission, wrote a letter to Senator Biden, Chairman of the Judiciary Committee, remarking that "it is unclear

whether Congress intended the carrier to be considered as a packaging material, or since it is commonly consumed along with the illicit drug, as a dilutent ingredient in the drug mixture". The Chairman of the Commission invited the Chairman of the Committee to introduce legislation choosing one or the other explicitly.

Senator Biden introduced an amendment to S. 1711, the Administration's omnibus drug bill, stating in materials read into the Congressional Record that the amendment changes the statute to omit the weight of the carrier. 135 Cong.Rec. S 12748 (daily ed. Oct. 5, 1989). So far as we can determine, the language he actually introduced did not contain the text to which his prepared statement referred. No language of this kind appears in the version the Senate passed. 135 Cong.Rec. S 13433 (daily ed. Oct. 16, 1989) (text of bill that Senate sent to House). The House is yet to act. Senator Kennedy has introduced an amendment to other legislation affecting the criminal code, which, like Senator Biden's, would exclude the carrier. Amendment No. 1716 to S.1970, 136 Cong.Rec. S 7069 (daily ed. May 24, 1990). But this proposal, too, awaits enactment. Both Senator Kennedy's proposal and Senator Biden's statement are more naturally understood as suggestions for change than as evidence of today's meaning. At all events, the Senators were speaking for themselves, not for Congress as an institution. See *Quern v. Mandley*, 436 U.S. 725, 736 n. 10, 98 S.Ct. 2068, 2075 n. 10, 56 L.Ed.2d 658 (1978).

Statements supporting proposals that have not been adopted do not inform our reading of the text an earlier Congress passed and the President signed, see *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989). We may not, in the name of faithful interpretation of what the political branches *enacted*, treat as authoritative the statements of legislators supporting change. Opinion polls of Senators are not law. See *Covalt v. Carey Canada Inc.*, 860 F.2d 1434,

1438-39 (7th Cir.1988). See also *In re Sinclair*, 870 F.2d 1340 (7th Cir.1989).

II

Only Brumm received a mandatory minimum sentence. Everyone else could have received the same sentence if all minima were excised from § 841, and if the weights in the statute were read as referring to pure LSD rather than to LSD-plus-carrier. The sentences of Marshall (20 years), Chapman (8 years), and Schoenecker (63 months) are derived largely from the sentencing guidelines. Understandably, these defendants argue that whether or not the statute counts the carrier medium, the quantity table in the guidelines does not.

This is not a strong argument. The guidelines speak of "mixture or substance", the statutory language. Footnote * to the quantity table at U.S.S.G. 2D1.1 says that "[u]nless otherwise specified, the weight of the controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Only PCP and methamphetamine are "otherwise specified". Application Note 9 reiterates that the footnote allows purity adjustments only for PCP and methamphetamine. Application Note 1 and § 2D1.1 says that " 'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841." As we observed in *United States v. Pinto*, 875 F.2d 143 (7th Cir.1989), and *United States v. White*, 888 F.2d 490 (7th Cir.1989), these notes are taken seriously as contemporaneous explanations by the authors. To conclude that the carrier medium is a statutory "mixture or substance" is to conclude that its weight counts under the guidelines as well.

For what it is worth, the guidelines demonstrate the view of the Sentencing Commission that the statutory weights include dilutents and carriers. None of the references to purity in the guidelines makes sense if the

weights in the statute deal with pure drugs to start with. The Commission's most recent words reinforce the conclusion that it understands both the statute and the guidelines to include the weight of the carrier medium for LSD. Recently the Commission transmitted to Congress a proposed amendment to U.S.S.G. 2D1.1 Application Note 11, the conversion table for cases in which only the number of doses is known. See 55 Fed.Reg. 19197 (May 8, 1990). This table gives LSD a weight of 0.05 mg per dose (20,000 doses per gram). The amendment specifies that the number of doses is not to be used to derive the weight of the "mixture or substance" if the actual weight is known, a caution necessary only if "mixture or substance" includes the carrier medium. Lest the smallest ambiguity remain, the Commission puts an asterisk after LSD and adds (emphasis added): "[T]he weight per unit shown is the weight of the actual controlled substance, *and not generally the weight of the mixture or substance containing the controlled substance.* Therefore, use of this table provides a very conservative estimate of the total weight." Couldn't be clearer that the Sentencing Commission believes that the weight of the carrier is part of the total "mixture or substance" under both the statute and the guidelines.

III

A constitutional question remains, given our construction of the statute and guidelines. The provision of the Constitution reading on sentences is the eighth amendment, forbidding the infliction of "cruel and unusual punishment". Marshall, alone among the four defendants, invokes the eighth amendment. It offers weak support at best. *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1984), holds that 40 years is not constitutionally excessive for distributing nine ounces of marijuana. Marshall got 20 for a more serious crime. Many federal courts have held that sentences in this range may

be imposed for selling similar volumes of LSD.[5] Other courts have sustained life without parole for drug offenses.[6] LSD causes psychoses, sometimes leading to suicide or violent aggression. Terrence C. Cox, Michael R. Jacobs, A. Eugene LeBlanc & Joan A. Marshman, *Drugs and Drug Abuse: A Reference Text* 311-15 (1983); Albert Hofmann, *LSD: My Problem Child* 67-73 (1979). Society believes that the sale of hallucinogens is a serious crime, and severe sentences constitutionally may attend the crimes troubling to the people. *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980); *United States v. Sanchez*, 859 F.2d 483 (7th Cir.1988); *United States v. Rhodes*, 779 F.2d 1019 (4th Cir.1985).

A

Although these defendants received sentences within the limits set by the eighth amendment—the provision of the Bill of Rights expressly addressed to quantum of punishment—they insist that their sentences are unconstitutional under the due process clause of the fifth amendment. Yet defendants received ample "process". Their complaint is about substance, not process. Substantive due process, a judicial invention, is least applicable when a provision of the Constitution directly addresses the subject. *Graham v. Connor*, —— U.S. ——, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (substantive due process is not an appropriate way to analyze excessive force in arrests, given the fourth amendment); see also *Chicago Board of Realtors, Inc. v.*

[5] Including our own opinion in *Rose*, which held that five years for 472 doses of LSD is consistent with the eighth amendment. See also, *e.g.*, *Bishop* (151 months permissible for possession of 3500 doses).

[6] *Michigan v. Harmelin*, 176 Mich.App. 524, 440 N.W.2d 75 (1989), cert. granted, —— U.S. ——, 110 S.Ct. 2559, 109 L.Ed.2d 742 (1990) (less than one kilogram of cocaine); *United States v. Aiello*, 864 F.2d 257 (2d Cir.1988); *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir.1988) (in banc); *United States v. Stewart*, 820 F.2d 1107 (9th Cir.1987) (Kennedy, J.).

Chicago, 819 F.2d 732, 742-45 (7th Cir.1987); *United States v. Miller*, 891 F.2d 1265, 1271-73 (7th Cir.1989) (concurring opinion). This is not an appropriate case for the deployment of that elusive doctrine.

Defendants' arguments are not so much about the sentences handed out for LSD in blotter paper as they are objections to the possibility that other persons will receive sentences much too long (LSD in orange juice) or too short (19,999 doses in pure form). But these are only possibilities, which have nothing to do with these sentences. *Defendants'* sentences bear rational relations to *their* offenses. That is all the Constitution requires, unless criminal defendants are entitled to assert third parties' rights to better sentencing practices—which they are not. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987); *Schall v. Martin*, 467 U.S. 253, 269 n. 18, 104 S.Ct. 2403, 2412 n. 18, 81 L.Ed.2d 207 (1984); *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522-23, 4 L.Ed.2d 524 (1960).

That someone else's sentence might be disproportionate to their offenses is no reason for altering these defendants' punishments. Effects of statutes on strangers are in general not sufficient to prevent application to oneself (this is not a first amendment case), and in particular the claim that someone else may not be punished severely enough is not a good objection to one's own punishment. *Wayte v. United States*, 470 U.S. 598, 607-10, 105 S.Ct. 1524, 1530-32, 84 L.Ed.2d 547 (1985); *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967); *Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir.1989). Prosecutors possess the power to excuse the big cheeses while landing on the small fry with hobnail boots. Discretion, even if it ends in grossly unequal treatment according to culpability, does not entitle a guilty defendant to avoid a sentence appropriate to his own crime. So too when the possibility may be attributed to the statute rather than (or in addition) to prosecutorial

choice. See *United States v. Batchelder*, 442 U.S. 114, 124-26, 99 S.Ct. 2198, 2204-05, 60 L.Ed.2d 755 (1979), holding that it does not violate the due process clause to enact two statutes providing different penalties for identical conduct—the mirror image of the claim in this case that the statutes do too little to impose graduated penalties for different conduct.

Until this century Congress did not attempt to differentiate sentences according to culpability, and it did not authorize judges to do so. Statutes often set out flat penalties for specified crimes, such as the sanction of 25 years' imprisonment for armed robbery of a postal carrier, 18 U.S.C. § 2114 (repealed in 1984), a term impervious to such variables as the amount taken and the use of violence. Courts thought identical (and severe) treatment of greatly different offenses constitutional. E.g., *United States v. Smith*, 602 F.2d 834 (8th Cir.1979); *Smith v. United States*, 284 F.2d 789, 791 (5th Cir.1960). We recounted the history briefly in *Pinto*, in the course of holding that the sentencing guidelines do not violate the due process clause by diminishing sentencing judges' discretion to tailor sentences closely to offense and offender.

Pinto rests on a conclusion that the due process clause allows Congress to write with broad strokes, recognizing that there will be a poor fit between the statutory elements of the offense and the sentence attached to them if other important factors are left out. (Here the omitted factor is the purity of the "mixture or substance".) Every other court of appeals has agreed with *Pinto*.[7]

[7] *United States v. Fox*, 889 F.2d 357 (1st Cir. 1989); *United States v. Vizcaino*, 870 F.2d 52 (2d Cir.1989); *United States v. Frank*, 864 F.2d 992 (3d Cir.1988); *United States v. Bolding*, 876 F.2d 21 (4th Cir.1989); *United States v. White*, 869 F.2d 822 (5th Cir.1989); *United States v. Allen*, 873 F.2d 963 (6th Cir. 1989); *United States v. Brittman*, 872 F.2d 827 (8th Cir.1989); *United States v. Brady*, 895 F.2d 538 (9th Cir.1990); *United States v. Thomas*, 884 F.2d 540 (10th Cir.1989); *United States v. Erves*, 880 F.2d 376 (11th Cir.1989); *United States v. Lafayette*, 896 F.2d 599 (D.C.Cir.).

Judges, who in the era between the end of uniform penalties and the creation of the guidelines had discretion to impose such sentences as pleased them, also may create disparity. Some judges thought wholesalers the principal threat; some were offended by retailers; some thought young criminals especially deserving of punishment; others excused women when men would have received high sentences for identical conduct. It was this crazy-quilt of incompatible yet unreviewable sentences, *Dorszynski v. United States*, 418 U.S. 424, 440-41, 94 S.Ct. 3042, 3051-52, 41 L.Ed.2d 855 (1974), that the 1984 code and the guidelines were designed to replace. No one supposes, however, that the pre-guideline practice was unconstitutional, even though the potential for disparity had been realized.

Neither uniform sentences that disregard characteristics of offense and offender, nor sentences so thoroughly discretionary that they are not comparable from one judge to another, violate the due process clause. Both systems have been tried in the United States and deemed constitutional. If they are constitutional, so is § 841. Maybe Congress ought to make the statute books more rational. Maybe it ought to specify that the sentence increases as a function of the net rather than the gross weight of the drug, but the task of determining how close to make the fit between offense and sentence is legislative.

B

Cases such as *McCleskey v. Kemp*, 481 U.S. 279, 306-08, 107 S.Ct. 1756, 1774-75, 95 L.Ed.2d 262 (1987), hold open the possibility of a constitutional objection under equal protection criteria when the punishment bears no relation whatever to the crime. See also *Marshall v. United States*, 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974), holding that statutory limits on eligibility

for low sentences may be examined, although only under the highly deferential rational basis test. Let us ask, then, whether the pattern of sentences under the drug laws is cockeyed. Other courts do not think so; they have uniformly rebuffed constitutional challenges to statutes that make punishment depend on gross rather than net weight.[8]

Both the statute and the guidelines make the sentence increase with quantity. The greater the quantity, the greater the sentence. This is a rational way to proceed. Whether the potential created by failure to adjust for purity will be realized depends not only on the range of purity that actually occurs but also on what can be done about the extreme cases. Do we see major suppliers of LSD skipping out the courthouse door because their pure drug falls outside the mandatory minima, and the catchall statute (§ 841(b)(1)(C)) does not allow judges to craft

[8] E.g., *United States v. Whitehead*, 849 F.2d 849, 858-60 & n. 26 (4th Cir.1988); *United States v. Baker*, 883 F.2d 13 (5th Cir. 1989); *United States v. Mendoza*, 876 F.2d 639, 641 (8th Cir. 1989); *Bishop, supra* note 4, 894 F.2d at 987; *United States v. Savinovich*, 845 F.2d 834 (9th Cir.1988); *United States v. Holmes*, 838 F.2d 1175 (11th Cir.1988). See also *United States v. Bayerle*, 898 F.2d 28, 31-32 (4th Cir.1990) (rejecting a constitutional challenge to the application of the weight tables to dilaudid, which like LSD is sold by the dose in dilute form). State cases to the same effect include *People v. Campbell*, 115 MichApp. 369, 320 N.W.2d 381, 382-83 (1982); *Traylor v. Delaware*, 458 A.2d 1170, 1176-77 (Del. 1983); *Florida v. Yu*, 400 So.2d 762 (Fla.1981); *People v. Mayberry*, 63 Ill.2d 1, 345 N.E.2d 97 (1976); see also *Daneff v. Henderson*, 501 F.2d 1180 (2d Cir.1974) (New York law). Cf. *United States v. Holland*, 810 F.2d 1215, 1219 (D.C.Cir.1987) (Congress need not rank offenses by severity when designing penalties); *United States v. Buckner*, 894 F.2d 975, 980-81 (8th Cir.1990) (§ 841's treatment of one gram of cocaine base (crack) as equivalent to 100 grams of cocaine does not violate substantive due process); *United States v. Thornton*, 901 F.2d 738 (9th Cir.1990) (enhancement provided by § 845a for sales within 1,000 feet of a school is rational as applied to sales that have no connection to school or school children).

sentences appropriate to their crimes? Do we see people going to jail for ten years because they sold one dose of LSD in a soft drink? If we don't, then the potential for disparity does not require holding statute and guidelines unconstitutional.

We do not see an inverted system of penalties. Counsel have not called to our attention, and we could not find, even one prosecution for selling a single dose of LSD, let alone a single-dose prosecution that ended in a preposterously high sentence. In the broad middle ground of retail and wholesale sales, in which (to judge from recent decisions) LSD almost always is sold in blotter paper, § 841 and the guidelines work as they should: the more doses, the greater the weight; the greater the weight, the longer the sentence. Marshall, wholesaler of 11,751 doses, gets 20 years; the other three defendants, retailers of 1,000, get five to eight years. As for the high end: any manufacturer or wholesaler who is in the business in a big way will trigger either § 841(b)(1)(A)(v) [10 years to life for 10 grams or more of LSD] or § 841(b)(1)(B)(v) [5 to 40 years for 1 gram or more of LSD]. A person who cannot be linked to even one gram is not such a big fish after all.

Even a "minor manufacturer" is covered by § 841(b)(1)(C), which authorizes a maximum sentence of 20 years without parole. Although this subsection lacks a mandatory minimum, this is irrelevant to the sentence. Minimum sentences are designed for little fish, the ones judges would throw back if the legislature would let them. That a manufacturer caught with less than a gram of pure LSD would not draw a *mandatory* minimum is of no moment. He could and likely would get the 20 years per count authorized by § 841(b)(1)(C), and probably there would be more than one count. A manufacturer or wholesaler will be involved in a conspiracy, the sentence for which may be tacked on to the sentence for the amount possessed or sold.

That is not the half of it. The *real* punishment for a manufacturer or a major wholesaler of any drug is not set by § 841. It is set by the Continuing Criminal Enterprise statute, 21 U.S.C. § 848. This law, "a carefully crafted prohibition . . . designed to reach the 'top brass' in the drug rings", *Garrett v. United States*, 471 U.S. 773, 781, 105 S.Ct. 2407, 2413, 85 L.Ed.2d 764 (1985), comes into play whenever a person organizes or supervises a criminal enterprise, involving at least five others, from which he earns substantial income. Major distributors fall within the statute, *United States v. Bond*, 847 F.2d 1233 (7th Cir.1988), as do those who aid and abet the drug chieftains, *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir.1989) (in banc). Persons who escape the jaws of § 841 walk into the maw of § 848. The CCE offense carries a minimum term of 20 years' imprisonment. If the defendant is "the principal administrator" and the enterprise has gross receipts of $10 million per year, the mandatory penalty is life without parole, 21 U.S.C. § 848 (b). There is in theory little risk, and in practice none, that the major players in the manufacture and distribution of LSD or any other illegal drug will be treated lightly compared with the four middlemen now before us. Defendants might have established that, despite all appearances, sentences are unrelated (or inversely related) to the amount of pure LSD involved. Yet they introduced no evidence to this effect, and none has been published in the social science literature. Persons who want a court to hold a statute unconstitutional need to do more than speculate. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212, 270, 6 L.Ed. 606 (1827) (opinion of Washington, J.).

Although the parties say that Congress legislated in ignorance, we lack support for that belief. Congress itself says the opposite, that it selected the weights in the table "after consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs". H.R.Rep. No. 99-845, 99th Cong., 2d Sess. 11 (1986). Agents and prosecutors are well-

acquainted with the effects of different drugs and the details of their distribution. The numbers in § 841 are not hat sizes. Yet even if we attribute unfamiliarity to Congress, we must recognize our own innocence of data. We do not know whether LSD leaves the factory (a) pure and dry, (b) on blotter paper, or (c) dissolved in alcohol (and, if in solution, at what rate of dilution). The range of weights per dose spans at least three orders of magnitude (see notes 1-3 above). If LSD is shipped in solution, then the higher-ups draw longer sentences per dose than do retailers; if shipped in blotter paper the sentences are the same per dose. We do not know the extent to which blotter paper dominates retail sales; if it holds the lion's share, then the risk of erratic sentences at the retail tier is small. We do not know the actual distribution of sentences. For all we can tell, sentences in LSD cases come *closer* to a smooth upward graduation per dose than do sentences for cocaine and heroin.[9] Lacking these facts, we are in no position to condemn this act of Congress as arbitrary in operation. Section 841 may work

[9] Judge Posner's dissenting opinion contends that the number of doses of LSD accounts for only 16% to 23% of the variance in sentences. This is a hypothetical calculation; data about the lengths of actual sentences (which we do not possess) may put things in better light, or may show that the correlation for LSD is no worse than that for other drugs. Judge Posner's hypothetical cases include many in which LSD is distributed on sugar cubes. Sugar cubes are so heavy compared to blotter paper that one might as well examine the effect on sentences of distributing LSD in bricks. If you remove the sugar cube hypotheticals from Judge Posner's sample (a plausible step, since there has not been even one sugar cube prosecution under § 841), the number of doses then explains 59.6% of the variance in sentences.

Contrast heroin, which is sold pure at wholesale and diluted at retail. Assume an average purity in retail sales of 2.5%, and 100% purity in wholesale sales. Assume also that the heroin is sold at retail purity in half of the cases. In this simple model, using the median guideline range, criminal history level I, for quantities from 1 gram to 50 kilograms, the quantity of pure heroin explains only 45% of the variance in sentences. LSD does not come off the worse for the comparison.

sensibly in practice and so is capable of constitutional application. E.g., *Caplin & Drysdale v. United States*, —— U.S. ——, 109 S.Ct. 2646, 2657, 105 L.Ed.2d 528 (1989); *Wheat v. United States*, 486 U.S. 153, 163, 108 S.Ct. 1692, 1699, 100 L.Ed.2d 140 (1988); *Salerno*, 481 U.S. at 745, 107 S.Ct. at 2100. Condemning a statute on the basis of a problem that may not exist is an inappropriate use of judicial power. *Schall*, 467 U.S. at 269 n. 18, 104 S.Ct. at 2412 n. 18; *Raines*, 362 U.S. at 21, 80 S.Ct. at 522-23.

C

The sentencing guidelines do not prevent judges from matching punishment to gravity of offense. The guidelines do nothing to mitigate the lenthy sentences to which the main suppliers are exposed under the CCE act. Nor do they require manufacturers to be treated like retailers even if § 841 is considered in isolation. Higher-ups receive increases under U.S.S.G. 3B1.1. Departures may follow hard on the increases. The "heartland" of the drug guidelines is distribution of dilute mixtures. Unrepresentative crimes lead to departures. Application Note 9 to U.S.S.G. 2D1.1 makes this clear in saying that "unusually high purity" of a drug may be the basis for upward departure. So sources may be treated in accord with their real culpability, even while the range in the table governs the dilute LSD usually recovered on the street. *United States v. Baker*, 883 F.2d 13, 15 (5th Cir.1989); *United States v. Diaz-Villafane*, 874 F.2d 43, 51 (1st Cir.1989).

The possibility of departures in either direction ensures the constitutionality of the guidelines. *United States v. Savage*, 888 F.2d 528, 529 (7th Cir.), rehearing denied, 894 F.2d 1495 (1989); *United States v. Thomas*, 884 F.2d 540, 542-43 (10th Cir.1989); *United States v. Allen*, 873 F.2d 963, 966 (6th Cir.1989). If the LSD is extraordinarily dilute, say in rum and Coca-Cola rather than blotter paper, the judge may depart downward, just as the judge may go up for special purity. Such escape hatches

ensure sufficient flexibility to comply with any proportionality requirement in the Constitution. Only the mandatory minimum sentences bind. The Federal Courts Study Committee recommends that these be repealed, *Report of the Federal Courts Study Committee* 133-34 (1990), but this is legislative rather than judicial business.

D

Although sentences under §§ 841, 846, and 848 together may be proportional to the number of doses sold, it would not matter if they were not. All Congress needs is a rational basis for making the penalties depend on gross rather than net weight. There are at least three.

First, LSD is sold at retail for a low price (a few dollars per dose). Blotter paper apparently has contributed to the renewed success of the drug, making it easy to transport, store, conceal, and sell. Because the carrier medium is an ingredient in the drug distribution business, it is rational to design a schedule of penalties based on that tool of the trade. Congress might choose to penalize drug smugglers according to the value of the property they use rather than the number of doses they distribute. The portions of the statute requiring the forfeiture of property used in connection with the sale of an illegal drug do exactly this, penalizing peddlers without regard to the volume of sales. Similarly, it is rational to make the penalty depend on a carrier that is essential to successful distribution of the drug.

Second, extracting the "pure" drug and debating whether that task has been done properly is unnecessary if, in 99% of all cases, LSD is sold in blotter paper. Why reduce the amount to a pure measure if that almost never spells a difference? No one has been prosecuted for distributing LSD in sugar cubes in the last 20 years. Similarly, no one has been prosecuted for possessing significant quantities of pure LSD in the last decade. Why worry about how to treat manufacturers caught redhanded with

pure dry LSD if they are never nabbed? Statutes rationally may be addressed to the main cases rather than the exceptions. Congress may count on prosecutorial discretion to take care of the absurd cases (one dose in a quart of lemonade), and it has created the CCE Act to take care of Mr. Big. It need not build into each *section* of the United States Code an apparatus sufficient in itself to produce graduated penalties.

Third, extracting LSD from blotter paper and weighing the drug *accurately* may be difficult. One dose is an exceedingly small quantity of pure LSD. Counsel suggested at oral argument that it takes a specialist in gas chromatography [10] to extract the drug, and that this is done only for samples rather than the defendant's entire supply. Figures reported in the cases (including this one) are extrapolations from samples, not actual weights. Congress rationally may decide to avoid a costly and imprecise process.

Although nothing in the legislative history suggests that Congress went through such a process of reasoning, it need not. Judges assess the validity of legislative decisions, we do not assign grades to legislative deliberations. The Supreme Court tells us that it is enough that a rational basis may be hypothesized, *Vance v. Bradley*, 440 U.S. 93, 110-12, 99 S.Ct. 939, 949-50, 59 L.Ed.2d 171 (1979); *Northside Sanitary Landfill, Inc. v. Indianapolis*, 902 F.2d 521 (7th Cir.1990) (collecting other cases), whether or not the legislature acted on it. Even laws that resulted from mistakes in the drafting process or ignorance in the halls of Congress survive if a rational basis may be supplied for the result. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 461-62, 66 L.Ed.2d 368 (1980); *Delaware Tribal*

[10] So counsel said; more likely a gas chromatograph tells you *whether* LSD is present without verifying the amount. It may take a gas centrifuge to extract and re-purify the drug, and it is very difficult and costly to run a sophisticated gas centrifuge.

Business Committee v. Weeks, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977).

E

What remains is concern that the statute and guidelines discriminate among retailers. Those who distribute LSD in sugar cubes generate higher gross weights (and thus higher sentences) than those who distribute on blotter paper. Some kinds of paper are heavier than others and so yield higher sentences. To say that the difference in weight between sugar and paper (or between brands of paper) condemns the rules with respect to LSD) is to damn the rules concerning heroin, cocaine, and all other drugs too. Anyway, these defendants sold LSD on blotter paper and as beneficiaries of any difference in sentencing (compared with sugar cubes) they are in no position to complain.

Any distributor concerned that sugar cubes weigh more than small squares of paper may reduce his exposure by choosing the lightest brand of paper as a medium. Blotter paper seems to be the norm these days. There have been no reported federal prosecutions in 20 years for distributing LSD in sugar cubes, and no state prosecutions in 17 (Michigan, in 1973, is the most recent, see *People v. Urban*, 45 Mich.App. 255, 206 N.W.2d 511 (1973)); to hold a law unconstitutional out of concern about something that has not happened in a generation is not sensible. More: Distributors pick their poison. The penalties are plain for all to see. They decide what drug to peddle, on what medium. Marshall liked the cost-benefit ratio for LSD, including its penalty, more than the cost-benefit ratio for cocaine. Perhaps the amount of crack cocaine leading to a 20 year term causes more social harm than the level of LSD that draws this sentence, but a court would not dream of requiring the weight ratios among LSD, heroin, and cocaine to reflect their "true dangerousness". No more should the court involve itself with the details of dilution ratios and carrier mediums.

Retailers who select sugar rather than blotter paper on which to sell LSD must accept their fate.

Political decisions may be harsh yet within the bounds of power. The Constitution does not compel Congress to adopt a criminal code with all possibility for unjust variation extirpated. Experience with the guidelines suggests the reverse: Every attempt to make the system of sentences "more rational" carries costs and concealed irrationalities, both loopholes and unanticipated severity. Criminals have neither a moral nor a constitutional claim to equal or entirely proportional treatment. Constitutional law is not a device allowing judges to set the "just price" of crime, to prescribe the ratio of retailers' to manufacturers' sentences. That Congress could have written better laws does not mean that it had to. *United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975). Amendments to the criminal code may be in order, but they are not ours to make under the banner of constitutional adjudication.

IV

Remaining objections to Marshall's sentence may be dealt with briefly. The district judge increased Marshall's offense level by two on concluding that Marshall was "an organizer, leader, manager, or supervisor" of the LSD distribution network. U.S.S.G. 3B1.1(c). Evidence that Marshall saturated the blotter paper with the LSD solution and sold it wholesale supports the district judge's finding that Marshall was organizing its distribution. Once the judge passes on contested issues of fact, or application of law to fact, our review is deferential. 18 U.S.C. § 3742(e), as amended and renumbered by the Anti-Drug Abuse Act of 1988, Pub.L. 100-690; *White*, 888 F.2d at 495; *United States v. Wright*, 873 F.2d 437, 443-44 (1st Cir.1989) (Breyer, J.); *United States v. Mejia-Orosco*, 868 F.2d 807 (5th Cir.1989). The conclusion that Marshall was an organizer is not clearly erroneous.

Marshall's other arguments all concern reasons for believing that the judge should have given him a sentence lower than the guideline range. His request was addressed to the district judge's discretion. We lack jurisdiction to review the court's decision to impose a sentence within the range. *United States v. Franz*, 886 F.2d 973 (7th Cir.1989). Marshall's appeal is dismissed for want of jurisdiction to the extent he asks us to direct the district judge to depart downward. In all other respects the judgments under review are

AFFIRMED.

CUMMINGS, Circuit Judge, with whom BAUER, Chief Judge, and WOOD, Jr., CUDAHY, and POSNER, Circuit Judge, join, dissenting:

Two assumptions lie at the heart of the majority opinion. The first is that the words "mixture or substance" are not ambiguous and are not therefore susceptible of interpretation by the courts. The second is that the due process clause of the Fifth Amendment guarantees process but not substance. Both of these assumptions are unwarranted.

Six courts, including the district court in *Marshall* have explicitly considered whether the carrier in an LSD case is a mixture or substance within the meaning of 21 U.S.C. § 841.[1] Five of these courts have concluded that the blotter paper is a "mixture or substance" within the meaning of the statute. *United States v. Larsen*, 904 F.2d 562 (10th Cir.1990); *United States v. Elrod*, 898 F.2d

[1] A seventh court, the Court of Appeals for the Fourth Circuit, has also held that the weight of the blotter paper should be included for sentencing purposes. As in this Circuit's decision in *United States v. Rose*, 881 F.2d 386, 388 (1989), however, the Fourth Circuit decision did not turn on whether the paper is properly considered a "mixture or substance" since the defendant conceded that point. *United States v. Daly*, 883 F.2d 313, 317 (4th Cir. 1989).

60 (6th Cir.1989); *United States v. Bishop*, 894 F.2d 981 (8th Cir.1990); *United States v. Taylor*, 868 F.2d 125 (5th Cir.1989); *United States v. Marshall*, 706 F. Supp. 650, 653 (C.D.Ill.1989). These courts rely primarily on the 1986 amendments to Section 841, which altered the references to various drugs, including LSD, by adding the words "mixture or substance containing a detectable amount of [the drug in question]." The earlier version of the statute referred merely to the drugs themselves. See *United States v. McGeehan*, 824 F.2d 677 (8th Cir.1987) (weight of carrier medium excluded from sentencing calculation under pre-amendment version of 21 U.S.C. § 841), certiorari denied *sub nom. Jovanovich v. United States*, 484 U.S. 1061, 108 S.Ct. 1017, 98 L.Ed.2d 982.

The sixth court, the United States District Court for the District of Columbia, held that blotter paper was not a mixture or substance within the meaning of the statute. *United States v. Healy*, 729 F. Supp. 140 (D.D.C. 1990). The court relied not only on ordinary dictionary definitions of the words mixture and substance but also on a November 30, 1988, Sentencing Commission publication, entitled "Questions Most Frequently Asked About the Sentencing Guidelines," which states that the Commission has not taken a position on whether the blotter paper should be weighed. The conclusion that the Commission has not yet resolved this question is further supported by a Sentencing Commission Notice issued on March 3, 1989, which requested public comments on whether the Commission should exclude the weight of the carrier for sentencing purposes in LSD cases.[2]

[2] The Commission has recently adopted several amendments and sent them to Congress for approval. Among these is an amendment to Application Note 11 to Guidelines Section 2D1.1. This amendment specifically states that the typical weight per dose of LSD that is given in the Weight Per Dose Table as .05 milligrams is the weight of the LSD alone and not of the LSD combined with any carrier. 55 Fed.Reg. 19197 (May 8, 1990). A recent reference to this amendment in the BNA Criminal Practice Manual incorrectly suggests that the amendment seeks to permit an adjustment to a sentence for an LSD conviction if the combined weights of the carrier and the LSD "grossly exaggerate" the sentence. BNA Criminal Practice Manual, Vol. 4, No. 11 at 249. In spite of this apparent misapprehension by the BNA, the Commission has not, as yet, taken a position on whether the weight of the blotter paper should be included for the purpose of calculating a sentence in an LSD case.

The *Healy* court also stated that Congress could have intended the words "mixture or substance" to refer to the liquid in which the pure LSD is dissolved. *Id.* Finally, the *Healy* court relied on a Guidelines table designed to provide a sentencing court with an equivalent weight for sentencing purposes in cases in which the number of doses distributed is known but the actual weight is unknown. The table provides that a dose of LSD weighs .05 milligrams. Guidelines § 2D1.1, Commentary, Drug Equivalency Tables. This weight closely approximates the weight of one dose of LSD without blotter paper, but is not an accurate reflection of one dose with blotter paper.[3]

The court in *Healy* did not refer to the legislative history of the statute to support the proposition that Congress did not intend the weight of the carrier to be included in LSD cases. This is not surprising since the only reference to LSD in the debates preceding the passage of the 1986 amendments to Section 841 was a passing reference that does not address quantities or weights of drugs. 132 Cong.Rec. S14270 (daily ed. Sept. 30, 1986) (statement of Sen. Harken).

[3] For example, in *Marshall* the parties stipulated that the defendant sold 11,751 doses of LSD. As previously noted, the total weight of these doses including the blotter paper was 113,320 milligrams. Thus if the blotter paper is included the weight of one dose would be 9.64 milligrams. On the other hand the weight of the LSD without the blotter paper in *Marshall* was 670.72 milligrams, and the weight of one dose if the blotter paper is not included is .057 milligrams.

Two subsequent pieces of legislative history, however, do shed some light on this question.[4] In a letter to Senator Joseph R. Biden, Jr., dated April 26, 1989 (Marshall Appendix at 165), the Chairman of the Sentencing Commission, William W. Wilkens, Jr., noted the ambiguity in the statute as it is currently written:

> With respect to LSD, it is unclear whether Congress intended the carrier to be considered as a packaging material, or, since it is commonly consumed along with the illicit drug, as a dilutant ingredient in the drug mixture * * *. The Commission suggests that Congress may wish to further consider the LSD carrier issue in order to clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture for punishment purposes.

Presumably acting in response to this query, Senator Biden added to the Congressional Record for October 5, 1989, an analysis of one of a series of technical corrections to 21 U.S.C. § 841 that were under consideration by the Senate that day. This analysis states that the purpose of the particular correction at issue was to remove an unintended "inequity" from Section 841 caused by the decisions of some courts to include the weight of the blotter paper for sentencing purposes in LSD cases. According to Senator Biden, the correction "remedie[d] this inequity by removing the weight of the carrier from the calculation of the weight of the mixture or sub-

[4] The Supreme Court has discussed the limitations of the use of subsequent legislative history in interpreting enacted legislation, but has declined to hold that subsequent legislative history is not entitled to any weight. Compare *Sullivan v. Finkelstein*, —— U.S. ——, —— n. 8, 110 S.Ct. 2658, 2665-66 n. 8, 110 L.Ed.2d 563 (1990), with *id.* —— U.S. at ——-——, 110 S.Ct. at 2665-67 (Scalia, J., concurring in part).

stance." [5] This correction was adopted as part of Amendment No. 976 to S. 1711. 135 Cong.Rec. S12749 (daily ed. Oct. 5, 1989). The amended bill was passed by a unanimous vote of the Senate (*id.* at S12765) and is currently pending before the House.[6]

Comments in more recent issues of the Congressional Record indicate that S. 1711 is not expected to pass the

[5] The complete text of the relevant portions of Senator Biden's supplementary analysis of Amendment No. 976 is as follows:

> Section 67 contains two amendments to the drug trafficking penalties in 21 U.S.C. § 841. The first amendment merely corrects a typographical error in section 6470(g) of the Anti-Drug Abuse Act of 1988.
>
> The second amendment responds to an inequity discussed in several recent cases involving LSD. See, *e.g.*, *United States v. Bishop*, 704 F.Supp. 910 (N.D.Iowa 1989). In these cases the courts determined that the weight of carriers such as sugar cubes, gelatin cubes, and blotter paper used to transport and consume ~~sub~~stances such as LSD should be counted in determining whether the weight of the "mixture or substance" was sufficient to trigger a mandatory minimum penalty.
>
> The inequity in these decisions is apparent in the following example. A single dose of LSD weighs approximately .05 mg. The sugar cube on which the dose may be dropped for purposes of ingestion and transportation, however, weighs approximately 2 grams. Under 21 U.S.C. § 841(b) a person distributing more than one gram of a "mixture or substance" containing LSD is punishable by a minimum sentence of 5 years and a maximum sentence of 40 years. A person distributing less than a gram of LSD, however, is subject only to a maximum sentence of 20 years. Thus a person distributing 1,000 doses of LSD in liquid form is subject to no minimum penalty, while a person handing another person a single dose on a sugar cube is subject to the mandatory five year penalty.
>
> The amendment remedies this inequity by removing the weight of the carrier from the calculation of the weight of the mixture or substance.

135 Cong.Rec. S12748 (daily ed. Oct. 5, 1989).

[6] Although the record indicates that Amendment No. 976 was passed in its entirety, the final version of S. 1711 as reproduced in the Congressional Record of October 16, 1989, does not appear to contain the relevant portion of the amendment.

House of Representatives. See 136 Cong.Rec. S943 (daily ed. Feb. 7, 1990). In the meantime, however, a second attempt to clarify Congress' intent in amending 21 U.S.C. § 841 to include the words mixture or substance has now been introduced in the Senate. On April 18, 1990, Senator Kennedy introduced an amendment to S. 1970 (a bill establishing constitutional procedures for the imposition of the death penalty) seeking to clarify the language of 21 U.S.C. § 841. That amendment, Amendment No. 1716, states:

> Section 841(b)(1) of title 21, United States Code, is amended by inserting the following new subsection at the end thereof: "(E) In determining the weight of a 'mixture or substance' under this section, the court shall not include the weight of the carrier upon which the controlled substance is placed, or by which it is transported."

136 Cong.Rec. S7069 (daily ed. May 24, 1990).

To be sure there are difficulties inherent in relying heavily on this subsequent legislative history. The first is that these initiatives to clarify the manner in which 21 U.S.C. § 841 and the sentencing guidelines treat LSD offenders may never be enacted. The second is that a given amendment may be viewed not as a clarification of Congress' original intent, but as the expression of an entirely new intent. At the very least, however, this subsequent legislative history, coupled with the fact that the Sentencing Commission has yet to resolve its position on the matter, refutes the proposition that the language of the statute and the Guidelines "couldn't be clearer."

It was established at oral argument that when illegal drugs are sold in capsules, the weight of the capsule is not included in calculating the total weight of the drugs for charging or sentencing purposes. See *Davis v. United States*, 279 F.2d 576, 578 (4th Cir.1960); *Thomas v. United States*, 239 F.2d 7, 8 (10th Cir.1956) (weight of

heroin sold in both cases excludes the weight of the capsule containing the heroin). Capsules are made of gelatin, Webster's Medical Desk Dictionary 97 (1986); Dorland's Illustrated Medical Dictionary 226 (23d ed. 1957), and yet their weight is not included. But the majority holds that when LSD is sold on gelatin the weight of the gelatin is included. Thus, apparently some gelatin is part of a "mixture or substance" and some is not. Does the determination depend on the shape into which the gelatin has been formed or on some other criterion? Would the gelatin be a part of the mixture or substance in an LSD case if a defendant sprayed an LSD-alcohol solution into a capsule, but not if a grain of LSD were placed into the capsule with a tweezers? It is not enough to say that "ordinary usage" precludes including the weight of a heavy glass bottle or a Boeing 747. The words "mixture or substance" are ambiguous, and a construction of those words that can avoid invalidation on constitutional grounds is therefore appropriate. See, *e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645; *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780, 101 S.Ct. 2142, 2147, 68 L.Ed.2d 612; *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296-97, 76 L.Ed. 598; *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208.

Even if such a construction is wrong, however, and Congress did intend to include the weight of various carrier media in the weight calculation in LSD cases, the defendants should still prevail, since such inclusion would violate the defendants' Fifth Amendment right to due process of law. The Fifth Amendment prohibits the government from engaging in discrimination that is so unjustified that it violates due process of law. *Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). The defendants in these cases do not complain that they have been treated differently from individuals

convicted of distributing other drugs, or differently from individuals convicted of distributing drugs in other places. Hence the equal protection holding in *Rose* and the decisions in cases such as *United States v. Holland*, 810 F.2d 1215 (D.C.Cir.1987) (enhanced penalty for distributing drugs within 1,000 feet of school does not violate due process), certiorari denied, 481 U.S. 1057, 107 S.Ct. 2199, 95 L.Ed.2d 854 are not applicable. Rather, the defendants contend that the statute and the Guidelines require two defendants convicted of selling the same number of doses of LSD for the same amount of money to be sentenced differently if they have chosen different inert carrier media to distribute the LSD.

The defendants have argued that their right to fairness in the criminal justice system, including the right to fair treatment in sentencing, is a fundamental right. Hence they contend that the statute and the Guideline Section at issue here should be subjected to strict scrutiny. See Rotunda, Nowak & Young, Treatise on Constitutional Law: Substance and Procedure § 18.41 (1986). The holding in *Marshall v. Parker*, 470 F.2d 34 (9th Cir. 1972), does not foreclose this argument. In *Marshall* the Ninth Circuit rejected the defendant's claim that the provision under which he was sentenced denied him equal protection. The provision at issue, Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-4255, excludes offenders who have been convicted of a felony on two or more prior occasions from eligibility for a drug rehabilitation treatment program. The Court held that the statute did not create a suspect classification, and that there was no " 'fundamental right' to rehabilitation at public expense." *Id.* at 38. Consequently the Ninth Circuit subjected the statute to rational basis review. The Supreme Court granted certiorari and employed the same standard of review as the Ninth Circuit, noting that the petitioner conceded that "rational basis" was the appropriate standard. *Marshall v. United States*, 414 U.S. 417, 422, 94 S.Ct. 700,

704, 38 L.Ed.2d 618. A decision that there is no fundamental right to rehabilitation at public expense is not equivalent to a decision that there is no fundamental right to fairness in sentencing.

This case does not require a resolution of whether there is a fundamental right to fairness in sentencing, however, since a difference in sentences based solely on the difference in the weight of an inert ingredient is not rationally related to the government's legitimate goal of eliminating the serious drug problem in this country. Congress' stated purpose in enacting the enhanced penalties of 21 U.S.C. § 841 was to punish major drug traffickers more harshly than minor participants. H.R.Rep. No. 845, 99th Cong., 2d Sess. Part I at 11-12.[7] A statute that punishes those convicted of distributing greater amounts (in terms of weight) of drugs will rationally serve this purpose *if* the drugs being distributed are sold by weight. As the government has conceded, however, LSD is not sold by weight, but by dose. A given number of doses will fetch a given price in the market. Neither the price of those doses nor the number of purchasers of those doses will increase because the LSD is sold on blotter paper instead of in its granular or liquid form. Thus a dealer selling LSD that weighs more because he has chosen to sell the drug on blotter paper will not be a more significant market participant than one who has chosen to sell the same number of doses in granular or liquid form. In fact, it is more likely that those individuals in possession of LSD in its granular or liquid form will be the major actors in any given LSD-trafficking network. They are the individuals who will have either

[7] The majority opinion advances three rationales that apparently never occurred to the government since the government briefs contain no mention of any of them. Furthermore, when asked at oral argument whether the Justice Department had suggested any rationale for punishing a distributor of one dose of LSD on a carrier more harshly than a distributor of numerous doses of LSD without a carrier the government attorneys conceded that it had not.

manufactured the drug or acquired it in order to apply it to a chosen carrier medium to facilitate eventual distribution. But under the current statutory scheme, and at a weight per dose of .05 milligrams, such a major dealer would be able to possess up to 20,000 doses of LSD in granular form without subjecting himself to the mandatory five-year minimum penalty of 21 U.S.C. § 841(b)(1)(A)(v). A statute that produces such a result and yet purports to punish major participants more severely cannot survive even the limited scrutiny of rational basis review.

Cases in which the Supreme Court has applied rational basis review and found a statute unconstitutional are few, but there are some. As the Supreme Court recently reiterated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438, 102 S.Ct. 1148, 1159, 71 L.Ed.2d 265 (1982), "the rational basis standard is 'not a toothless one.'" (citations omitted). In *Logan*, a majority of the Court agreed that an employment discrimination claim deadline violated the plaintiff's right to equal protection because it was not rationally related to the stated goals of expediting legitimate claims and discouraging unfounded claims. 455 U.S. at 438-442, 102 S.Ct. at 1159-1162 (separate opinion of Blackmun, J., joined by Brennan, J., Marshall, J., and O'Connor, J.), 455 U.S. at 443-444, 102 S.Ct. at 1161-1162 (concurring opinion of Powell, J., joined by Rehnquist, J.). See also *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973) (all finding statutes unconstitutional under rational basis review).

The majority has decided that ambiguous language is clear and that rational basis review is toothless. I therefore respectfully dissent.

POSNER, Circuit Judge, joined by BAUER, Chief Judge, and CUMMINGS, WOOD, Jr., and CUDAHY, Circuit Judges, dissenting.

In each of these cases consolidated for decision en banc (and in a third that is awaiting decision, *United States v. Dean*, No. 89-2786), the district court sentenced sellers of LSD in accordance with an interpretation of 21 U.S.C. § 841 that is plausible but that makes the punishment scheme for LSD irrational. It has been assumed that an irrational federal sentencing scheme denies the equal protection of the laws and therefore (*Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)) violates the due process clause of the Fifth Amendment. *Marshall v. United States*, 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974); *McGinnis v. Royster*, 410 U.S. 263, 270, 93 S.Ct. 1055, 1059-60, 35 L.Ed.2d 282 (1973); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C.Cir. 1989); *United States v. Pineda*, 847 F.2d 64 (2d Cir. 1988). The assumption is proper, and in order to avoid having to strike down the statute we are entitled to adopt a reasonable interpretation that cures the constitutional infirmity, even if that interpretation might not be our first choice were there no such infirmity.

The statute fixes the minimum and maximum punishments with respect to each illegal drug on the basis of the weight of the "mixture or substance containing a detectable amount of" the drug. Examples are five years minimum and twenty years maximum for selling a hundred grams of a "mixture or substance containing a detectable amount of" heroin and ten years minimum and forty years maximum for selling a kilogram of such a mixture or substance. The corresponding weights for LSD are one gram and ten grams. The quoted words are critical. Drugs are usually consumed, and therefore often sold, in a diluted form, and the adoption by Congress of the "mixture or substance" method of grading punishment reflected a conscious decision to mete out heavy punishment to large

retail dealers, who are likely to possess "substantial street quantities," which is to say quantities of the diluted drug ready for sale. H.R.Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). That decision is well within Congress's constitutional authority even though it may sometimes result in less severe punishment for possessing a purer, and therefore a lighter, form of the illegal drug than a heavier but much less potent form.

The statute fixes only the minimum and maximum punishments and for the actual punishment in a particular case we must go to the Sentencing Guidelines. They proportion punishment to the weight of the mixture or substance, defined as in the statute. § 2D1.1, Application Note 1; § 2D.1, Drug Quantity Table, n. *. They permit an adjustment upward for sales of unusual purity, § 2D1.1, Application Note 9, but this takes care of the problem identified in the previous paragraph only in part; the statutory mandatory minimum sentences (which, like the Guidelines sentences themselves, are not subject to parole) truncate the effort of the Guidelines' framers to tie the severity of punishment in the particular case to the gravity of the defendant's misconduct.

Based as it is on weight, the system I have described works well for drugs that are sold by weight; and ordinarily the weight quoted to the buyer is the weight of the dilute form, although of course price will vary with purity. The dilute form is the product, and it is as natural to punish its purveyors according to the weight of the product as it is to punish moonshiners by the weight or volume of the moonshine they sell rather than by the weight of the alcohol contained in it. So, for example, under Florida law it is a felony to possess one or more gallons of moonshine, and a misdemeanor to possess less than one gallon, regardless of the alcoholic content. Fla. Stat. §§ 561.01, 562.451.

LSD, however, is sold to the consumer by the dose; it is not cut, diluted, or mixed with something else. Moreover,

it is incredibly light. An average dose of LSD weighs .05 milligrams, which is less than two millionths of an ounce. To ingest something that small requires swallowing something much larger. Pure LSD in granular form is first diluted by being dissolved, usually in alcohol, and then a quantity of the solution containing one dose of LSD is sprayed or eyedropped on a sugar cube, or on a cube of gelatin, or, as in the cases before us, on an inch-square section of "blotter" paper. (LSD blotter paper, which is sold typically in sheets ten inches square containing a hundred sections each with one dose of LSD on it, is considerably thinner than the paper used to blot ink but much heavier than the LSD itself.) After the solution is applied to the carrier medium, the alcohol or other solvent evaporates, leaving an invisible (and undiluted) spot of pure LSD on the cube or blotter paper. The consumer drops the cube or the piece of paper into a glass of water, or orange juice, or some other beverage, causing the LSD to dissolve in the beverage, which is then drunk. This is not dilution. It is still one dose that is being imbibed. Two quarts of a 50-proof alcoholic beverage are more than one quart of a 100-proof beverage, though the total alcoholic content is the same. But a quart of orange juice containing one dose of LSD is not more, in any relevant sense, than a pint of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint. It would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer.

The weight of the carrier is vastly greater than that of the LSD, as well as irrelevant to its potency. There is no comparable disparity between the pure and the mixed form (if that is how we should regard LSD on blotter paper or other carrier medium) with respect to the other

drugs in section 841, with the illuminating exception of PCP. There Congress specified alternative weights, for the drug itself and for the substance or mixture containing the drug. For example, the five-year minimum sentence for a seller of PCP requires the sale of either ten grams of the drug itself or one hundred grams of a substance or mixture containing the drug. 21 U.S.C. § 841 (b)(1)(B)(iv).

Ten sheets of blotter paper, containing a thousand doses of LSD, weigh almost six grams. The LSD itself weighs less than a hundredth as much. If the thousand doses are on gelatin cubes instead of sheets of blotter paper, the total weight is less, but it is still more than two grams, *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987), which is forty times the weight of the LSD. In both cases, if the carrier plus the LSD constitutes the relevant "substance or mixture" (the crucial "if" in this case), the dealer is subject to the minimum mandatory sentence of five years. One of the defendants before us (Marshall) sold almost 12,000 doses of LSD on blotter paper. This subjected him to the ten-year minimum, and the Guidelines then took over and pushed him up to twenty years. Since it takes 20,000 doses of LSD to equal a gram, Marshall would not have been subject to even the five-year mandatory minimum had he sold the LSD in its pure form. And a dealer who sold fifteen times the number of doses as Marshall—180,000—would not be subject to the ten-year mandatory minimum sentence if he sold the drug in its pure form, because 180,000 doses is only nine grams.

At the other extreme, if Marshall were not a dealer at all but dropped a square of blotter paper containing a single dose of LSD into a glass of orange juice and sold it to a friend at cost (perhaps 35 cents), he would be subject to the ten-year minimum. The juice with LSD dissolved in it would be the statutory mixture or substance containing a detectable amount of the illegal drug and it

would weigh more than ten grams (one ounce is about 35 grams, and the orange juice in a glass of orange juice weighs several ounces). So a person who sold one dose of LSD might be subject to the ten-year mandatory minimum sentence while a dealer who sold 199,999 doses in pure form would be subject only to the five-year minimum. Defendant Dean (in No. 89-2786) sold 198 doses, crowded onto one sheet of blotter paper: this subjected him to the five-year mandatory minimum, too, since the ensemble weighed slightly more than a gram.

There are no reported orange juice cases; for that matter there are no reported *federal* cases in which the carrier is a sugar cube rather than a gelatin cube, although sugar cubes are said to be a common LSD carrier, *United States v. Marshall*, 706 F.Supp. 650, 652 (C.D.Ill.1989), and in two state cases defendants have been prosecuted for unlawful possession of one and of six LSD-laced sugar cubes, respectively. *People v. Urban*, 45 Mich.App. 255, 206 N.W.2d 511 (1973); *Commonwealth v. Cohen*, 359 Mass. 140, 268 N.E.2d 357 (1971). A sugar cube weighs more than two grams, so a seller of a mere six sugar cubes laced with LSD—six doses—would, if prosecuted federally, have bought himself the mandatory minimum ten-year sentence.

All this seems crazy but we must consider whether Congress might have had a reason for wanting to key the severity of punishment for selling LSD to the weight of the carrier rather than to the number of doses or to some reasonable proxy for dosage (as weight is, for many drugs). The only one suggested is that it might be costly to determine the weight of the LSD in the blotter paper, sugar cube, etc., because it is so light! That merely underscores the irrationality of basing the punishment for selling this drug on weight rather than on dosage. But in fact the weight is reported in every case I have seen, so apparently it can be determined readily enough; it *has* to be determined in any event, to permit a purity adjust-

ment under the Guidelines. If the weight of the LSD is difficult to determine, the difficulty is easily overcome by basing punishment on the number of doses, which makes much more sense in any event. To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant.

A person who sells LSD on blotter paper is not a worse criminal than one who sells the same number of doses on gelatin cubes, but he is subject to a heavier punishment. A person who sells five doses of LSD on sugar cubes is not a worse person than a manufacturer of LSD who is caught with 19,999 doses in pure form, but the former is subject to a ten-year mandatory minimum no-parole sentence while the latter is not even subject to the five-year minimum. If defendant Chapman, who received five years for selling a thousand doses of LSD on blotter paper, had sold the same number of doses in pure form, his Guidelines sentence would have been fourteen months. And defendant Marshall's sentence for selling almost 12,000 doses would have been four years rather than twenty. The defendant in *United States v. Rose*, 881 F.2d 386, 387 (7th Cir.1989), must have bought an unusually heavy blotter paper, for he sold only 472 doses, yet his blotter paper weighed 7.3 grams—more than Chapman's, although Chapman sold more than twice as many doses. Depending on the weight of the carrier medium (zero when the stuff is sold in pure form), and excluding the orange juice case, the Guidelines range for selling 198 doses (the amount in *Dean*) or 472 doses (the amount in *Rose*) stretches from ten months to 365 months; for selling a thousand doses (*Chapman*), from fifteen to 365 months; and for selling 11,751 doses (*Marshall*), from 33 months to life. In none of these computations, by the way, does the weight of the LSD itself make a difference—so slight is its weight relative to that of the carrier—except of course when it is sold in pure form. Congress might

as well have said: if there is a carrier, weigh the carrier and forget the LSD.

This is a quilt the pattern whereof no one has been able to discern. The legislative history is silent, and since even the Justice Department cannot explain the why of the punishment scheme that it is defending, the most plausible inference is that Congress simply did not realize how LSD is sold. The inference is reinforced by the statutory treatment of PCP.

We can actually *measure* the rationality of the punishment scheme for LSD, by regressing the Guidelines sentence on the number of doses sold. The sentence should increase with the number of doses, and the number of doses should explain most of the variance in sentences. Using the different weights of blotter paper disclosed by the cases (including *Dean*), plus gelatin cubes, sugar cubes, and no carrier (for sales of pure LSD) as additional dosage forms, I have been able to calculate that for sales of between one dose and a thousand, although the average Guidelines sentence does increase with the number of doses, that number explains only 23 percent of the possible sentencing variance for these different methods of selling the drug. For sales of between one dose and 180,000 doses the amount of variance explained falls to 16 percent. Differences in the severity of punishment are determined by differences in the weight of the carrier medium, even though that weight is completely irrelevant to culpability. I have abstracted from criminal history and other personal factors that might influence the sentence of a particular defendant, but I have not abstracted from the mandatory minimum sentencing provisions, because they are a key element in the irrationality of the scheme for punishing LSD offenders.

That irrationality is magnified when we compare the sentences for people who sell other drugs prohibited by 21 U.S.C. § 841. Marshall, remember, sold fewer than 12,000 doses and was sentenced to twenty years. Twelve

thousand doses sounds like a lot, but to receive a comparable sentence for selling heroin Marshall would have had to sell ten kilograms, which would yield between one and two million doses. Platt, Heroin Addiction: Theory, Research, and Treatment 50 (2d ed. 1986); cf. Diamorphine 63, 98 (Scott ed. 1988). To receive a comparable sentence for selling cocaine he would have had to sell fifty kilograms, which would yield anywhere from 325,000 to five million doses. Washton, Cocaine Addiction: Treatment, Recovery and Relapse Prevention 18 (1989); Cocaine Use in America: Epidemiologic and Clinical Perspectives 214 (Kozel & Adams, eds., National Institute on Drug Abuse Pamphlet No. 61, 1985)). While the corresponding weight is lower for crack—half a kilogram—this still translates into 50,000 doses.

LSD is a potentially dangerous drug, especially for psychotics (whom it can drive to suicide). Hoffman, LSD: My Problem Child 67-71 (1983). But many things are dangerous for psychotics. No one believes that LSD is a more dangerous drug than heroin or cocaine (particularly crack cocaine). The general view is that it is *much* less dangerous. Cox, *et al.*, Drugs and Drug Abuse: A Reference Text 313-15 (1983). There is no indication that Congress believes it to be more dangerous, or more difficult to control. The heavy sentences that the law commands for minor traffickers in LSD are the inadvertent result of the interaction among a statutory procedure for measuring weight, adopted without understanding how LSD is sold; a decision to specify harsh mandatory minimum sentences for drug traffickers, based on the weight of the drug sold; and a decision (gratuitous and unreflective, as far as I can see) by the framers of the Guidelines to key punishment to the statutory measure of weight, thereby amplifying Congress's initial error and ensuring that the big dealer who makes or ships the pure drug will indeed receive a shorter sentence than the small dealer who handles the stuff in its street form. As the wholesale value of LSD may be as

little as 35 cents a dose (Report 1988: The Supply of Illicit Drugs to the United States 52 (National Narcotics Intelligence Consumers Comm. 1989)), a seller of five sugar cubes could be subject to a mandatory minimum prison term of ten years for selling $2 worth of illegal drugs. Dean received six years (no parole, remember) for selling $73 worth. The irrationality is quite bad enough if we confine our attention to LSD sold on blotter paper, since the weight of blotter paper varies considerably, making punishment turn on a factor that has no relation to the dosages or market values of LSD.

Well, what if anything can we judges do about this mess? The answer lies in the shadow of a jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disgreement between the severely positivistic view that the consent of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as "equal protection of the laws") authorize judges to enrich positive law with the moral values and practical concerns of civilized society. Judges who in other respects have seemed quite similar, such as Holmes and Cardozo, have taken opposite sides of this issue. Neither approach is entirely satisfactory. The first buys political neutrality and a type of objectivity at the price of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness. It is no wonder that our legal system ocillates between the approaches. The positivist view, applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words (taken one by one) of the relevant enactments. The natural law or pragmatist view leads to a freer in-

terpretation, one influenced by norms of equal treatment; and let us explore the interpretive possibilities here. One is to interpret "mixture or substance containing a detectable amount of [LSD]" to exclude the carrier medium —the blotter paper, sugar or gelatin cubes, and orange juice or other beverage. That is the course we rejected in *United States v. Rose*, *supra*, 881 F.2d at 388, as have the other circuits. I wrote *Rose*, but I am no longer confident that its literal interpretation of the statute, under which the blotter paper, cubes, etc. are "substances" that "contain" LSD, is inevitable. The blotter paper, etc. are better viewed, I now think, as carriers, like the package in which a kilo of cocaine comes wrapped or the bottle in which a fifth of liquor is sold.

Interpreted to exclude the carrier, the punishment schedule for LSD would make perfectly good sense; it would not warp the statutory design. The comparison with heroin and cocaine is again illuminating. The statute imposes the five-year mandatory minimum sentence on anyone who sells a substance or mixture containing a hundred grams of heroin, equal to 10,000 to 20,000 doses. One gram of pure LSD, which also would trigger the five-year minimum, yields 20,000 doses. The comparable figures for cocaine are 3250 to 50,000 doses, placing LSD in about the middle. So Congress may have wanted to base punishment for the sale of LSD on the weight of the pure drug after all, using one and ten grams of the pure drug to trigger the five-year and ten-year minima (and corresponding maxima—twenty years and forty years). This interpretation leaves "substance or mixture containing" without a referent, so far as LSD is concerned. But we must remember that Congress used the identical term in each subsection that specifies the quantity of drug that subjects the seller to the designated minimum and maximum punishments. In thus automatically including the same term in each subsection, Congress did not necessarily affirm that, for each and every

drug covered by the statute, a substance or mixture containing the drug *must* be found.

The flexible interpretation that I am proposing is decisively strengthened by the constitutional objection to basing punishment of LSD offenders on the weight of the carrier medium rather than on the weight of the LSD. Courts often do interpretive handsprings to avoid having even to *decide* a constitutional question. *Gomez v. United States*, —— U.S. ——, 109 S.Ct. 2237, 2241, 104 L.Ed.2d 923 (1989). In doing so they expand, very questionably in my view, the effective scope of the Constitution, creating a constitutional penumbra in which statutes wither, shrink, are deformed. A better case for flexible interpretation is presented when the alternative is to nullify Congress's action: when in other words there is not merely a constitutional question about, but a constitutional barrier to, the statute when interpreted literally. *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 211, 39 L.Ed. 297 (1895). This is such a case.

The Supreme Court held in *Bolling v. Sharpe* that action by the federal government which if it were state action would violate the equal protection clause of the Fourteenth Amendment violates the due process clause of the Fifth Amendment (the Fifth Amendment contains no equal protection clause). This, then, is a form of "substantive due process" expressly approved by the Supreme Court; disparage it—reject it—and you affirm the power of the federal government to practice racial discrimination, since the constitutional prohibition against such discrimination derives from the equal protection clause. Because under *Bolling v. Sharpe* equal protection is a duty of the federal government, it does not matter that, viewed in isolation, the sentences in the cases before us are not so disproportionate to the gravity of the defendants' conduct that they violate the loose principles of proportionality that courts have found in the Eighth Amendment's prohibition of cruel and unusual punish-

ments. Cf. *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam). The sentences stand condemned under a different principle: that which forbids the unequal treatment of people identically situated. That this principle exists and is potentially applicable to criminal punishment can scarcely be doubted, quite apart from the cases cited at the beginning of this opinion. Suppose that through a draftman's error a statute fixed a two-year minimum sentence for attempted larceny and a one-year minimum for larceny. A person sentenced for attempted larceny could not complain that his punishment was cruel and unusual, but he could complain that he was being punished pursuant to an irrational punishment scheme. And so with the dealer who sells a thousand doses of LSD on heavy blotter paper, the dealer who sells a thousand doses on light blotter paper, the dealer who sells the same number of doses on gelatin cubes, the dealer who sells the same number on sugar cubes, and the dealer who sells the same number in pure form: all these dealers are identically situated, so far as the purposes animating the drug statute are concerned; all can complain, therefore, that they are being sentenced pursuant to an irrational scheme that denies them the equal protection of the laws.

Not all types of dealer are before us in these two cases, it is true; but in challenging a statute as a denial of equal protection a plaintiff will invariably be comparing his situation under the statute with those of persons not before the court. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Orr v. Orr*, 440 U.S. 268, 272-73, 99 S.Ct. 1102, 1108-09, 59 L.Ed.2d 306 (1979); *Kucharek v. Hanaway*, 902 F.2d 513, 516, 520-21 (7th Cir.1990). How could it be otherwise? If a tax statute exempts a class of taxpayers on grounds claimed to be irrational, no member of that class will attack the exemption as a denial of equal protection, yet the challenger must be able to point to the favored class in support of his constitutional challenge. He is permitted to do this without having to drag the members of that class into court. The defendants in the cases before us point to the manufacturer who ships LSD in granular form (the sensible way to ship it, since that is the lightest and most compact form), the dealer who sells LSD on gelatin cubes rather than blotter paper, and the dealer who uses light rather than heavy blotter paper, as persons irrationally exempted from the heavy sentences that the mandatory minimum punishment provisions of section 841, in conjunction with the provisions of the Guidelines, have placed the defendants in our cases under. The defendants have no standing to complain about the hypothetical punishment of the person who sells LSD in sugar cubes or glasses of orange judice, but, as with the use of hypothetical cases in legal reasoning generally, these examples are relevant to exploring the logic behind the scheme of punishment—and show that there is none.

The point is not that the judicial imagination can conjure up anomalous applications of the statute. A statute is not irrational because its draftsmen lacked omniscience. The point is that graduating punishment to the weight of the carrier medium produces, in the case of LSD, a systematically, unavoidably bizarre schedule of punishments that no one is able to justify. I would give respectful consideration to *any* rationale for the schedule advanced by the legislators, the framers of the Guidelines, or the Department of Justice. None has been advanced. And such give as there is in the Guidelines (the purity adjustment) is unavailing when defendants are subject to the mandatory minimum sentences in section 841, as all the defendants before us (plus Dean) are.

Granted, when the total system of federal criminal punishment is considered, including prosecutorial discretion and executive clemency, it becomes arguable that the grossest inequities enabled by reading section 841 to base punishment on the weight of the carrier rather than

of the LSD are unlikely to occur. Maybe that is why we have seen no recent sugar-cube cases. But this argument is too powerful; it would eliminate or at least greatly curtail the judicial role in protecting criminal defendants from arbitrary statutes, by preventing the defendant from showing that the statute was arbitrary.

Our choice is between ruling that the provisions of section 841 regarding LSD are irrational, hence unconstitutional, and therefore there is no punishment for dealing in LSD—Congress must go back to the drawing boards, and all LSD cases in the pipeline must be dismissed—and ruling that, to preserve so much of the statute as can constitutionally be preserved, the statutory expression "substance or mixture containing a detectable amount of [LSD]" excludes the carrier medium. Given *this* choice, we can be reasonably certain that Congress would have preferred the second course; and this consideration carries the argument for a flexible interpretation over the top.

That interpretation would bring the statute into line with the punishment for other illegal drugs; but this is only an incidental benefit because, as ruled in *Rose* (correctly, as it seems to me and has seemed to the other courts that have considered the question, see *United States v. Elrod*, 898 F.2d 60 (6th Cir.1990) (per curiam), and other cases cited there), it is not a feasible judicial office to rationalize the thousands of different federal criminal prohibitions, passed at different times in different climates of opinion, that are scattered throughout the United States Code. Cf. *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); *Edwards v. United States*, 814 F.2d 486, 489 (7th Cir.1987). The relevant irrationality—which was not presented as an issue in *Rose* and which has not received full consideration in any other case either, although there are glancing references to it in *United States v. Bishop*, 894 F.2d 981, 985-86 (8th Cir.1990),

and *United States v. Elrod*, *supra*, 898 F.2d at 63; cf. *United States v. Bayerle*, 898 F.2d 28, 31 (4th Cir. 1990)—lies in making the punishment of LSD offenders vary by the adventitious and indeed perverse factor of the weight of the carrier. But it is reassuring that in removing this irrationality from section 841 we would create no new disparities between the punishment of sellers of LSD and the punishment of other drug offenders.

The literal interpretation adopted by the majority is not inevitable. All interpretation is contextual. The words of the statute—interpreted against a background that includes a constitutional norm of equal treatment, a (closely related) constitutional commitment to rationality, an evident failure by both Congress and the Sentencing Commission to consider how LSD is actually produced distributed, and sold, and an equally evident failure by the same two bodies to consider the interaction between heavy mandatory minimum sentences and the Sentencing Guidelines—will bear an interpretation that distinguishes between the carrier vehicle of the illegal drug and the substance or mixture containing a detectable amount of the drug. The punishment of the crack dealer is not determined by the weight of the glass tube in which he sells the crack; we should not lightly attribute to Congress a purpose of punishing the dealer in LSD according to the weight of the LSD carrier. We should not make Congress's handiwork an embarrassment to the members of Congress and to us.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Date: July 17, 1990

Before: HONORABLE WILLIAM J. BAUER, Chief Judge
HONORABLE WALTER J. CUMMINGS, Circuit Judge
HONORABLE HARLINGTON WOOD, JR., Circuit Judge
HONORABLE RICHARD D. CUDAHY, Circuit Judge
HONORABLE RICHARD A. POSNER, Circuit Judge
HONORABLE JOHN L. COFFEY, Circuit Judge
HONORABLE JOEL M. FLAUM, Circuit Judge
HONORABLE FRANK H. EASTERBROOK, Circuit Judge
HONORABLE KENNETH F. RIPPLE, Circuit Judge
HONORABLE DANIEL A. MANION, Circuit Judge
HONORABLE MICHAEL S. KANNE, Circuit Judge

No. 89-2420

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

STANLEY J. MARSHALL,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division
No. 88 CR 30051, Judge Richard Mills

Nos. 89-3364, 89-3390, 89-3391

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER and PATRICK BRUMM,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 89 CR 46, Chief Judge Barbara B. Crabb

JUDGMENT—WITH ORAL ARGUMENT

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the appeal of Marshall is DISMISSED for want of jurisdiction to the extent he asks this Court to direct the district judge to depart downward; in all other respects the judgments under review are AFFIRMED, in accordance with the opinion of this Court filed this date.

SUPREME COURT OF THE UNITED STATES

No. 90-5744

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER and PATRICK BRUMM,

Petitioners

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 10, 1990

Supreme Court, U.S.
FILED
JAN 31 1991
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 90-5744

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF PETITIONERS

T. CHRISTOPHER KELLY
(Appointed by this Court)
121 South Hamilton Street
Madison, Wisconsin 53703
(608) 255-6607
Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether a carrier to which LSD is adhered for ease of delivery constitutes a "mixture or substance containing" LSD within the meaning of the federal sentencing guidelines and 21 U.S.C. § 841(b)(1)(B)(v), so that the weight of the carrier is included in the total weight that determines the guideline sentence and triggers mandatory minimum sentences.

If the first question is answered affirmatively, two constitutional questions are presented:

2. Whether a defendant has a fundamental right to substantive fairness in sentencing, requiring strict scrutiny of a claimed impairment of that right.

3. Whether basing sentences for LSD distribution upon the arbitrary weight of the LSD carrier violates a defendant's right to due process of law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-5744

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 908 F.2d 1312 (7th Cir. 1990).

The memorandum decision and order of the United States District Court for the Western District of Wisconsin (Crabb, J.) has not been reported. It is reproduced in the joint appendix. (J.A. 13)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was rendered on July 17, 1990, affirming petitioners' judgments of conviction entered on October 20, 1989 and October 24, 1989. Jurisdiction was conferred upon the court of appeals generally by 28

U.S.C. § 1291 and specifically by 18 U.S.C. § 3742, authorizing appeals from sentences imposed after November 1, 1987 which are alleged to violate the law or to misapply the Sentencing Guidelines. The petition for writ of certiorari was filed September 17, 1990. Certiorari was granted December 10, 1990. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of the Supreme Court of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

21 U.S.C. § 841 provides in relevant part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .
>
> (b) Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> . . .
>
> (1)(A) In the case of a violation of subsection (a) of this section involving—
>
> . . .
>
> (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
>
> . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .
>
> (B) In the case of a violation of subsection (a) of this section involving—
>
> . . .

> (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
>
> . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . .

Amendment V to the United States Constitutior provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A criminal complaint, filed April 20, 1989, charged each petitioner with one count of distributing LSD. (J.A. 3) The affidavit in support of the complaint indicated that petitioner Chapman provided an undercover officer with 1,000 "hits of blotter-type LSD" in exchange for $1,750.00 in recorded currency. (J.A. 6, ¶ 6) The affidavit further indicated that, after petitioner Chapman left the presence of the undercover officer, he joined petitioners Schoenecker and Brumm in a van. (J.A. 7, ¶ 7) Chapman and Schoenecker left the van and drove away in Schoenecker's car. The car was stopped and Chapman and Schoenecker were arrested. Recorded currency totalling $850.00 was recovered from Schoenecker. (J.A. 7, ¶ 8) Brumm was also arrested and was found to be in possession of $900.00 in recorded currency. (J.A. 7-8, ¶¶ 9-10) The complaint indicates that "[t]he LSD weighed approximately 5.7 grams." (J.A. 8, ¶ 10)

An indictment filed May 3, 1989 charged each petitioner with distributing approximately 5 grams of LSD in violation of 21 U.S.C. § 841. (J.A. 9) Each petitioner entered a guilty plea. Prior to sentencing, each petitioner moved the court to declare the five year mandatory minimum sentencing provision of 21 U.S.C. § 841(b)(1)(B)(v), and the Sentencing Guidelines, unconstitutional as applied to LSD distribution, on the ground that the sentencing scheme violated the Fifth Amendment guarantee of due process of law. (R. 102, 104, 106) For the purpose of sentencing and appeal, the government stipulated that the weight of the LSD distributed by petitioners, apart from the weight of the blotter paper, was less than one gram. The government further stipulated that LSD is commonly sold by the dose, or "hit," without regard to the weight of the carrier that contains the dose. (J.A. 12) In a written decision and order, the district court denied petitioners' motions to declare the statute and Sentencing Guidelines unconstitutional. (J.A. 13)

Petitioner Brumm's judgment of conviction was entered October 20, 1989. He was sentenced to the mandatory minimum five year term of imprisonment. (J.A. 18) The judgments of conviction of petitioners Chapman and Schoenecker were entered October 24, 1989. Petitioner Chapman was sentenced to a 96 month prison term. (J.A. 30) Petitioner Schoenecker received a 63 month sentence. (J.A. 24)

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. After oral argument before a three judge panel, the court, on its own motion, ordered a rehearing *en banc*. By a 6 to 5 vote, the court of appeals affirmed the trial court's ruling. *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990).

Petitioners filed a petition for writ of certiorari with the United States Supreme Court on September 17, 1990. Certiorari was granted December 10, 1990. (J.A. 90)

SUMMARY OF ARGUMENT

In its efforts to punish and deter the distributors of controlled substances, Congress attempted to ensure that federal drug law would focus most intensely on "major traffickers . . . who are responsible for creating and delivering very large quantities of drugs," and managers of retail traffic who sell drugs in "substantial quantities." H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). To that end, Congress made mandatory minimum sentences applicable to persons who distribute large quantities of drugs. Quantities in the legislative scheme are determined by weight. Specific weights of various drugs trigger minimum sentences of five or ten years. 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B).

Following the lead of Congress, the United States Sentencing Commission promulgated Sentencing Guidelines that progressively increase the severity of sentences imposed for distribution of progressively larger amounts of drugs. *See* United States Sentencing Commission, *Guidelines Manual* § 2D1.1 (1990)[1] (hereinafter *Guidelines Manual*). The evident intent of the sentencing scheme is to visit harsher penalties upon more culpable distributors, measuring culpability by the weight of the drugs distributed.[2]

Congress has generally provided that drug weights include any "mixture or substance containing a detectable

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[1] Because the issues presented in this brief have posed a continuing problem since the promulgation of the Sentencing Guidelines, reference throughout the brief will be made to the current edition of the *Guidelines Manual*. Unless otherwise noted, prior editions do not differ in any way relevant to the issues raised on appeal.

[2] The quantities triggering the mandatory minimum penalties were "based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain." H.R. Rep. No. 845, 99th Cong., 2d Sess. 12 (1986).

amount of" the proscribed drug. 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B). If, for instance, a quantity of cocaine were mixed with a quantity of mannitol, the weight of the entire mixture would determine the applicability of a minimum sentence.[3]

It makes sense to punish the distribution of greater weights of a drug more severely if the drug is sold by weight. Since a cutting agent, like mannitol, adds to the total weight of the drug, increasing the number of doses that can be distributed, it makes equal sense to base the punishment upon the combined weight of the drug and the cutting agent. However, it makes no sense to follow this formula for punishment mechanistically when the drug is not sold by weight, and when the "mixture or substance containing" the drug does not increase the number of doses available for distribution.

The government stipulated that LSD is sold by the dose, not by weight. (J.A. 12) A dose of pure LSD weighs about 0.05 milligrams. *See* "Typical Weight Per Unit (Dose, Pill, or Capsule) Table," *Guidelines Manual* § 2D1.1, comment. (n.11). Because the dose is so small, LSD is adhered to a carrier (such as a sugar cube, a piece of blotter paper, or a gelatin capsule) before distribution to the consumer. While carriers vary in weight, it is always true that the weight of the LSD is insignificant compared to the weight of the carrier.[4]

A. The first issue raised on appeal is whether an LSD carrier is a "mixture or substance containing" LSD, within the meaning of § 841(b)(1) and the Sentencing Guidelines. If it is, the weight of the carrier effectively determines the sentence. Since carriers vary in weight,

[3] *See, e.g., United States v. Holmes*, 838 F.2d 1175, 1177-78 (11th Cir.), *cert. denied*, 486 U.S. 1058 (1988) (counting entire cocaine mixture for sentencing purposes).

[4] The weight of the LSD is generally less than 1 percent of the weight of the carrier. *United States v. Marshall*, 908 F.2d 1312, 1315-16 (7th Cir. 1990).

including the weight of the carrier for sentencing produces different sentences for different carriers. The differences are extreme. For instance, a distributor with no prior criminal history who sells 100 doses of LSD on sugar cubes would receive a guideline sentence of 188 to 235 months. The same distributor selling the same 100 doses of LSD on blotter paper would receive a guideline sentence of 63 to 78 months. The same distributor selling the same 100 doses of LSD in pure liquid form, without a carrier, would receive a guideline sentence of 10 to 16 months.[5] Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 Crim. L. Bull. 50, 56 n.19 (1990).

Thus, if the carrier is considered a "mixture or substance containing" LSD, the law requires federal judges to impose wildly disparate sentences upon offenders based upon the arbitrary circumstance of the weight or absence of the carrier. There is no moral or legal distinction between selling LSD on blotter paper or selling LSD on sugar cubes. The sugar cube dealer is no more evil than the blotter paper dealer. Selling LSD on a sugar cube neither increases the potency of the drug nor multiplies the quantity of the drug that is available for sale. A dose of LSD is a dose of LSD, regardless of the carrier to which it is adhered. Although the sugar cube dealer and the blotter paper dealer will have committed exactly the same crime, the law as interpreted by the court below forces sentencing judges to ignore the dealers' equal culpability and to base their sentences on an arbitrary factor.

The irrational and unfair results compelled by this interpretation of the law lie at the heart of this appeal. Basing sentences upon the weight of the product sold, when the product is not sold by weight, is nonsensical.

[5] It is ironic that the dealer who distributes pure liquid LSD receives the shortest sentence, for that dealer has probably climbed the highest in the distribution chain.

It could not have been the intent of Congress to make sentences in LSD cases hinge upon an arbitrary factor, particularly when doing so wreaks havoc upon the goal of sentencing uniformity that the Sentencing Guidelines were intended to promote. While the Courts of Appeals that have considered the question have followed what they regarded as the plain meaning of the statute, it is not plain that Congress intended an LSD carrier to be a "mixture or substance containing" LSD, any more than it intended a syringe or a suitcase to be a "substance containing" heroin or a car to be a "substance containing" cocaine found in the glove compartment. Common sense argues against a literal interpretation of the phrase "mixture or substance containing" LSD, as do the rule of lenity, the rule that a statute should be interpreted to avoid unreasonable or absurd results, and the rule that constructions casting doubt on a statute's constitutionality should be avoided.

B. The second issue raised on appeal addresses the constitutional problems caused by allowing markedly different sentences to be imposed upon identically situated offenders based upon the arbitrary weight of an LSD carrier. Due process of law prohibits the government from basing a denial of liberty on an arbitrary factor. Equal protection of the law prohibits the government from treating equally situated offenders differently unless there is a justifiable reason for doing so. Petitioners argue, as a third issue, that their right to be free from an arbitrary deprivation of liberty—their right to be sentenced fairly—is fundamental, and that any infringement of that right must be strictly scrutinized. Even if the court examines the due proces and equal protection claims under a rational basis test, however, the sentencing scheme is unconstitutional as applied to LSD, because there is no rational basis for making the length of a sentence depend upon a factor that has no relationship to culpability or to any other legitimate sentencing consideration. For these reasons, the judgments below

must be reversed and the cases remanded for resentencing.

ARGUMENT

I. THE WORDS "MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT" OF LSD SHOULD BE CONSTRUED TO EXCLUDE THE CARRIER TO WHICH LSD IS ADHERED

A. Because LSD Is Not Sold By Weight, the Weight of the LSD Carrier Should Not Determine a Defendant's Sentence

"In its pure form, LSD tartrate is a water-soluble crystalline material." *United States v. Healy*, 729 F. Supp. 140, 141 (D.D.C. 1990). Pure LSD can also be delivered in a liquid or powdered form. B. Wells, *Psychedelic Drugs* 48 (1974). In its laboratory form, LSD generally comes in 100 microgram ampoules, ready for injection. *Id.* In its street form, LSD is rarely injected. Because an effective dose of LSD is extremely small, it is adhered to a carrier for ease of distribution. Blotter paper,[6] gelatin capsules, and sugar cubes have been most frequently employed as carriers, but anything that will conveniently hold a microscopic drop of liquid—including such substances as candy and animal crackers—will do. *Id.* at 46, 48; Committee Report, *Dependence on LSD and Other Hallucinogenic Drug*, 202 J. A.M.A. 47, 47 (October 2, 1967).

Carrier weights vary enormously. A sugar cube weighs about 2,270 mg. Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Of-*

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[6] The blotter paper used to transport LSD is generally a thin sheet of paper, perforated into squares. A dose of LSD is adhered to each square. The consumer may either swallow the square of paper, lick the LSD from the paper without ingesting the paper, or insert the paper into a beverage, releasing the drug into the beverage. *United States v. Marshall*, 908 F.2d 1312, 1315 (7th Cir. 1990); *United States v. Elrod*, 898 F.2d 60, 61 (6th Cir. 1990); *United States v. Bishop*, 894 F.2d 981, 983 (8th Cir. 1990).

fenses, 26 Crim. L. Bull. 50, 56 n.19 (1990). A square of blotter paper may weigh about 14 mg.[7] *Id.* A gelatin capsule appears to weigh 2.25 mg.[8] A dose of pure LSD in liquid form weighs 0.05 mg. *Id.*

Both Congress and the Sentencing Commission have linked the severity of sentences for LSD distribution to the weight of the LSD distributed. *See* 21 U.S.C. § 841(b)(1); *Guidelines Manual*, § 2D1.1. Congress has mandated a minimum ten year sentence for the distribution of 10 grams or more of "a mixture or substance containing a detectable amount" of LSD. 21 U.S.C. § 841(b)(1)(A)(v). A minimum five year sentence is required for the distribution of 1 gram or more of "a mixture or substance containing a detectable amount" of LSD. 21 U.S.C. § 841(b)(1)(B)(v).

If the LSD carrier is deemed a "mixture or substance containing" LSD, sales of relatively modest amounts of LSD will trigger mandatory minimum sentences. Moreover, since the weight of the carrier overwhelms the weight of the LSD, sentences will depend almost entirely upon the weight of the carrier. The distributor who

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[7] As drug traffickers do not adhere to quality control standards, the weight of blotter paper varies from dealer to dealer. Petitioners' blotter paper, containing 1,000 doses of LSD, weighed 5.7 grams, or 5.7 mg. per dose. Respondent Marshall's blotter paper, containing 11,751 doses, weighed 113.32 grams, or 9.6 mg. per dose. *Marshall*, 908 F.2d at 1316, n.1. In *United States v. Rose*, 881 F.2d 386, 387 (7th Cir. 1989), 472 doses on blotter paper weighed 7.3 grams (15.4 mg. per dose). In *United States v. Elrod*, 898 F.2d 60, 61 (6th Cir. 1990), 1,990 doses adhered to blotter paper weighed approximately 11 grams (5.5 mg. per dose). Five thousand doses of LSD on blotter paper weighed 44.133 grams, or 8.8 mg. per dose, in *United States v. Healy*, 729 F.Supp. 140, 141 (D.D.C. 1990). Thus, the weight of a single square of blotter paper ranged from 5.5 mg. in *Elrod* to 15.4 mg. in *Rose*.

[8] In *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988), 1,000 gelatin capsules containing LSD weighed 2.25 grams, or 2.25 mg. per capsule.

uses a heavier carrier will be punished more severely than the distributor who sells the same number of doses (or even fewer) on a lighter carrier. An example of these disparities can be shown in tabular form:

Carrier	Weight of 100 doses [9]	Base offense level	Guideline range (months) [10]
Sugar cube	227 gr.	36	188-235
Blotter paper	1.4 gr.	26	63-78
Gelatin capsules	225 mg.	18	27-33
Liquid LSD (no carrier)	5 mg.	12 [11]	10-16

Thus, for selling the same number of doses of LSD, the sugar cube dealer will receive a sentence approximately 7 times longer than the gelatin capsule dealer's sentence, and 18 times longer than the sentence imposed upon the dealer who uses no carrier at all.

These anomalous results accrue from treating LSD as if it were sold by weight. As the government stipulated in the trial court, LSD is sold by the dose, or "hit," without regard to weight. (J.A. 12) Distributors and consumers use carriers for the sake of convenience. The distributor and consumer contract for the sale of a specific number of doses of LSD at a specific price, without regard to the weight of the carrier to which the doses are adhered. Using a heavier carrier adds no value to the drug. A heavier carrier does not increase the potency of the drug, nor does it increase the number of consumers to whom the drug can be distributed. Since

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[9] Except for gelatin capsules, weights are taken from Scotkin, *supra* at 56 n.19. As Scotkin does not give a weight for gelatin capsules, the weight in *McGeehan*, 824 F.2d at 680 is used.

[10] For comparative purposes, the Guideline range stated here assumes a Criminal History Category I. *See Guidelines Manual* § 5A.

[11] Distribution of any amount less than 50 mg. of LSD qualifies as base offense level 12. *See Guidelines Manual* § 2D1.1(c)(16).

LSD is not sold by weight, it makes no sense for LSD sentences to be dependent upon the weight of the LSD carrier.

The nature of LSD distribution therefore distinguishes an LSD carrier from a "cutting agent," which is mixed with a drug to increase the amount of the drug available for distribution. While Congress undoubtedly intended cutting agents to fall within the definition of a "mixture or substance containing" a drug, Congress could not reasonably have intended the term "mixture or substance" to be given its broadest meaning. "Substance" means "[a]ny particular kind of corporal matter" or a "species of matter of a definite chemical composition." 17 *Oxford English Dictionary* 64 (2d ed. 1989). Thus, read broadly, the weight of *anything* that "contains" LSD—whether a sugar cube, a heavy jar, or a Buick—would be considered for sentencing purposes.

The weights of containers and packaging materials are not considered when determining the weight of the controlled substances they contain. *United States v. Marshall*, 908 F.2d 1312, 1329 (7th Cir. 1990) (Cummings, J., dissenting) ("when illegal drugs are sold in capsules, the weight of the capsule is not included in calculating the total weight of the drugs for charging or sentencing purposes"); *United States v. Luster*, 896 F.2d 1122, 1127 (8th Cir. 1990) (§ 841(b)(1)(A)(iii) includes "the weight of the entire mixture or substance without packaging"); *United States v. Smith*, 840 F.2d 886, 888 (11th Cir.), *cert. denied*, 448 U.S. 859 (1988) (court considered weight of crack cocaine "mixture" but did not include the weight of 60 vials). Similarly, because it is not a cutting agent, the weight of water in crack cocaine is not counted toward the total weight of the crack. *United States v. Chester*, 48 Crim. L. Rep. (BNA) 1175 (D.D.C. 1990).

A vial containing liquid LSD is literally a "substance containing" LSD, but no court has suggested that the

weight of the vial should be included in the total weight for sentencing purposes. A glass of orange juice into which a single dose of LSD has been inserted is a "substance containing" LSD, but it would be absurd to count the weight of either the glass or the orange juice in determining a sentence. Judge Posner recognized the absurdity in dissent:

> [I]f Marshall were not a dealer at all but dropped a square of blotter paper into glass of orange juice and sold it to a friend at cost (perhaps 35 cents), he would be subject to the ten-year minimum. The juice with LSD dissolved in it would be the statutory mixture or substance containing a detectable amount of the illegal drug and it would weigh more than ten grams (one ounce is about 35 grams, and the orange juice in a glass of orange juice weighs several ounces). So a person who sold one dose of LSD might be subject to the ten-year mandatory minimum while a dealer who sold 199,999 doses in pure form would be subject only to the five-year minimum.

Marshall, 908 F.2d at 1332-33 (Posner, J., dissenting). Judge Posner's hypothetical suffices to demonstrate the absurdity of construing the phrase "mixture or substance" in a broad, literal manner.

The majority opinion below recognized that the phrase "mixture or substance containing" LSD cannot include all LSD carriers. The court noted that a gram of LSD in a heavy bottle is still just a gram of LSD. The court suggested that some "mingling of the drug with something else" is necessary to transform the carrier into a "mixture or substance." *Marshall*, 908 F.2d at 1317. Yet the concept of "mingling" does not appear in the dictionary definition of "substance," and LSD adhered to a carrier does not satisfy the definition of "mixture" because LSD is not "mixed" or diffused evenly throughout the carrier.[12] The majority correctly understood that the words

[12] "LSD, however, is sold to the consumer by the dose; it is not cut, diluted, or mixed with something else." *Marshall*, 908 F.2d at 1331 (Posner, J., dissenting).

"mixture or substance" cannot be read broadly, that all carriers do not fall within the scope of that phrase. The majority erred, however, in deciding, without further analysis of the *purpose* of the phrase "mixture or substance," to "adhere to the unanimous conclusion of the other courts of appeals that blotter paper treated with LSD is a 'mixture or substance containing a detectable quantity of' LSD." *Marshall*, 908 F.2d at 1318.

B. Decisions of the Courts of Appeals Have Followed a Mistaken View of the "Plain Meaning" of the Words "Mixture or Substance"

The other courts of appeals, unlike the court below, have failed to recognize that not all carriers can be included in the phrase "mixture or substance," and have therefore failed to analyze the ambiguity present in that phrase. Because a Buick, or even a bottle, was obviously not within the meaning of "mixture or substance containing" LSD intended by Congress, the scope of the phrase is unclear.

Despite the absurdity of giving a broad reading to the phrase "mixture or substance containing" LSD, the disturbing trend in the lower courts has been to do just that. Several courts have held that the words "mixture or substance containing" LSD are unambiguous and must therefore be given their "plain meaning."[13] *United States v. Elrod*, 898 F.2d 60, 62 (6th Cir. 1990) (*per curiam*); *United States v. Taylor*, 868 F.2d 125, 127-28 (5th Cir. 1989); *United States v. Bishop*, 894 F.2d 981, 985 (8th Cir. 1990);[14] *United States v. Larsen*, 904 F.2d 562, 563 (10th Cir. 1990).

[13] A Seventh Circuit case, predating *Marshall*, also held that an LSD carrier fell within the plain meaning of the phrase "mixture or substance," although that issue had been neither raised nor briefed by the defendant. *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989). Judge Posner, the author of *Rose*, dissenting in *Marshall*, indicated that he had changed his mind about the wisdom of that conclusion. He has come to believe that an LSD carrier should be treated as packaging material rather than a "mixture or substance" containing LSD. *Marshall*, 908 F.2d at 1335 (Posner, J., dissenting).

The same conclusion was drawn, albeit reluctantly, in *United States v. Daly*, 883 F.2d 313, 318 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2622 (1990) (concluding that the statute must be followed "to the letter" because it is "clear on its face"). *Daly* recognized that "the use of 'mixture or substance' quantities as the benchmark for determining base offense levels under the Guidelines sometimes produces striking disparities in sentencing—at least where the drug is LSD." *Daly*, 883 F.2d at 316. Remaining faithful to the "plain language" of the statute and of the Guidelines has forced courts "to ignore the possibility that manifestly aberrational and largely circumstantial disparities in sentencing will result." *Id.* at 317.

The *Daly* court found two arguments in favor of a literal interpretation of the statute persuasive. First, the court noted that Congress distinguished between pure phencyclidine (PCP) and a mixture or substance containing a detectable amount of PCP. A ten year minimum sentence applies to the distribution of one hundred grams of PCP, or of one kilogram of a mixture or substance containing a detectable amount of PCP. 21 U.S.C. § 841(b)(1)(A)(iv). Since the same two-part penalty structure is not imposed with regard to LSD, the court concluded that Congress intended that enhanced penalties be determined by the weight of the mixture or substance containing LSD, not by the weight of the LSD itself. *Id.* at 317-18. *Accord*, *Marshall*, 908 F.2d at 1317; *Elrod*, 898 F.2d at 62.

A more compelling explanation for the differing treatment of LSD and PCP, given the absurd results that follow from basing punishments on the arbitrary weight of

[14] *Bishop* is followed without further analysis in *United States v. Ruklick*, 919 F.2d 95 (8th Cir. 1990) and *United States v. Follett*, 905 F.2d 195 (8th Cir. 1990).

the carrier chosen to hold the LSD, "is that Congress simply did not realize how LSD is sold." *Marshall*, 908 F.2d at 1333 (Posner, J., dissenting). The failure of Congress to differentiate between LSD without a carrier and LSD adhered to a carrier—i.e., the failure to create a rational sentencing structure, as it did with PCP—is strong evidence that Congress inadvertently treated LSD as if it were sold by weight. Certainly, the fact that Congress failed to enact rational legislation with regard to LSD, when it did so with regard to PCP, is no proof that Congress *intended* to be arbitrary.

The second argument relied upon by the *Daly* court is the mistaken notion that blotter paper serves the same function as "cutting agents" used with other drugs. Because blotter paper can be ingested with the drug, the court reasoned, it is the same as any other dilutant, and its weight should be counted for the purpose of sentencing. *Daly*, 883 F.2d at 318. *Accord*, *Bishop*, 894 F.2d at 985.

Courts relying on this argument misperceive the purpose of a cutting agent. Cutting agents serve to multiply the number of doses of a drug that can be distributed. Take, for instance, a cocaine distributor who sells cocaine by the gram. He has twenty grams of cocaine available for distribution. By cutting (i.e., mixing) the cocaine with an equal weight of mannitol, the distributor can double the number of doses available for sale. By diluting the product, the distributor increases the supply of the drug, and correspondingly increases both his profits and the social harm he causes.

Such is not the case with LSD, because LSD is sold by the dose, not by the weight of the product. A dose consists of a fixed amount of LSD. A distributor who has enough LSD to sell 20 doses will sell no more than 20 doses. He may sell them on any of a variety of carriers, but he will do so by placing one dose on each carrier.

The carrier neither dilutes the LSD [15] nor increases the number of doses available to market. The carrier simply facilitates convenient drug delivery. While *Daly* found it significant that an LSD carrier can be ingested with the drug, as can a cutting agent or dilutant, the ingestability of a substance does not transform it into a cutting agent, because ingestibility does not increase the number of doses that can be marketed. As Judge Posner pointed out in dissent:

> The consumer drops the cube or the piece of paper into a glass of water, or orange juice, or some other beverage, causing the LSD to dissolve in the beverage, which is then drunk. This is not dilution. It is still one dose that is being imbibed. . . . [A] pint of orange juice containing one dose of LSD is not more, in any relevant sense, than a quart of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint. It would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer.

Marshall, 908 F.2d at 1332 (Posner, J., dissenting).

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[15] LSD constitutes less than 1 percent of the total weight of blotter paper impregnated with LSD. The majority below observed that this "dilution rate" may not be unusual for street drugs. *Marshall*, 908 F.2d at 1316. The court's observation is meaningless, because LSD carriers do not "dilute" LSD. A person who buys a dose of LSD will receive the same quantity of the same potency, and will achieve the same result by ingesting the drug, whether the dose is sold on blotter paper, a sugar cube, a gelatin capsule, or as liquid in a syringe. LSD cannot be meaningfully compared to drugs that are diluted by mixing them with inert substances in order to increase the volume, and hence the weight, of the product to be sold.

C. The Words "Mixture or Substance Containing" LSD Are Ambiguous

One court has agreed that the phrase "mixture or substance containing" LSD should be read to exclude the LSD carrier. *United States v. Healy*, 729 F. Supp. 140 (D.D.C. 1990). Rejecting a broad definition of "substance," the court held that blotter paper soaked in LSD does not fall within the ordinary concept of "a kind or species of matter." *Id.* at 142. Noting that the definition of "mixture" requires two substances to be put together so that the particles of one are evenly diffused among the particles of the other, the court concluded that LSD is not diffused through the blotter paper that holds it, and thus is not a "mixture." *Id.* After finding that excluding a carrier from the "mixture or substance containing" LSD would promote sentencing uniformity and avoid sentences that are disproportionate to the offense, the court concluded that the weight of the carrier should not be included in the sentencing determination. *Id.* at 143-44.

Some members of Congress agree that the use of the phrase "mixture or substance containing a detectable amount of LSD" was less than precise. Senator Biden introduced a "technical amendment" to respond to the inequity that the Senator perceived in subjecting a person who distributes 1,000 doses of LSD in liquid form "to no minimum penalty, while a person handing another person a single dose on a sugar cube is subject to the mandatory five year penalty." 135 Cong. Rec. S 12748 (daily ed. Oct. 5, 1989) (Senator Biden's Supplementary Analysis of Amendment No. 976). The amendment would have remedied the inequity "by removing the weight of the carrier from the calculation of the weight of the mixture or substance." *Id.*[16] A similar amendment, providing that the weight of a "mixture or substance" under section 841(b)(1) "shall not include the

[16] The amendment was withdrawn before Congress had an opportunity to act on it.

weight of the carrier upon which the controlled substance is placed or by which it is transported" has been introduced by Senator Kennedy. 136 Cong. Rec. S 7069 (daily ed. May 24, 1990). The proposed legislation, while not necessarily proof of Congressional intent at the time of the original enactment, establishes that the phrase "mixture or substance" is unclear in its application to LSD.

The Sentencing Commission has acknowledged the ambiguity in the phrase "mixture or substance containing" LSD. While the Guidelines have adopted the "mixture or substance" language, *Guidelines Manual* § 2D1.1, the Guidelines do not indicate whether an LSD carrier is a mixture or substance containing LSD. The Commission, recognizing that bizarre results follow from linking sentences to the weight of the LSD carrier, solicited public comment on the issue.[17] In a letter to Senator Biden, William Wilkins, Jr., the Commission Chairman, stated that the Commission believed the Guidelines should be interpreted consistently with the Controlled Substances Act to avoid "a definition at variance with what the courts determine to be applicable for purposes of statutory minimum sentences."[18] Recognizing the ambiguity in the statutory language, as well as the sentencing disparities caused by making sentences depend upon the nature of the carrier,[19] Chairman Wilkins stated:

[17] [I]f the carrier was weighed as part of the mixture, a person selling 100 doses of LSD would have an offense level of 32, or 26, or 12 depending on whether the LSD was on a sugar cube, blotter paper, or in a liquid form.

The Commission seeks comment on the most appropriate response to this situation (i.e., should or should not the Commission amend the guidelines to exclude the weight of the "carrier" in LSD cases for guideline purposes?).

54 Fed. Reg. 9136 (March 3, 1989).

[18] Letter from Commission Chairman William W. Wilkins, Jr., to Senator Joseph R. Biden, Jr. at 1 (April 26, 1989).

[19] *Id.* at 2.

> With respect to LSD, it is unclear whether Congress intended the carrier to be considered as a packaging material, or since it is commonly consumed along with the illicit drug, as a dilutant ingredient in the drug mixture (similar to the manner in which granular sugar used to "cut" heroin is considered part of a heroin mixture). The Commission suggests that Congress may wish to further consider the LSD carrier issue in order to clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture for punishment purposes.[20]

Not knowing how the words "mixture or substance" would eventually be interpreted, the Commission adopted an amendment stating that "'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841."[21] The Commission also indicated that it would raise the issue in its required report to Congress.[22] The Commission has not, however, taken a position as to whether the weight of the carrier should determine the sentence under the Guidelines.[23] *Marshall*, 908 F.2d at 1327 n.2 (Cummings, J., dissenting).

Determining and giving effect to Congressional intent is the first goal of statutory construction. *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123

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[20] *Id.* The letter is quoted in large part in *Daly*, 883 F.2d at 316-17.

[21] Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 Crim. L. Bull. 50, 56 n.19 (1990), *quoting* U.S. Sentencing Commission, *Guidelines Manual* Appendix C, amendment 123, amending § 2D1.1, Commentary, Application Note 1 (Nov. 1, 1989).

[22] *Id.*

[23] A Sentencing Commission Publication, "Questions Most Frequently Asked About the Sentencing Guidelines," dated November 30, 1988, "states that the Commission has not taken a position on whether the blotter paper should be weighed." *Marshall*, 908 F.2d at 1327 (Cummings, J., dissenting).

(1987). It is difficult to imagine that Congress intended to cause the unfair sentencing disparities that follow from a broad interpretation of "mixture or substance." The "plain meaning" of the words is not as obvious as the Courts of Appeals have suggested.[24] The clarifying amendments introduced by Senators Biden and Kennedy, as well as the comments of the Sentencing Commission, demonstrate that the meaning of "mixture or substance" intended by Congress is far from plain. The mere recognition by the majority below that the words "mixture or substance" cannot be read literally to include all "substances" (such as vials or vehicles) containing LSD establishes that the phrase is ambiguous. The court in *Healy* and the five dissenters in *Marshall* gave the words "mixture or substance containing a detectable amount of LSD" a reasonable construction, one that is consistent with the purpose of the enhanced penalties and with the goal of sentencing uniformity.[25]

D. The Legislative History Demonstrates that the Words "Mixture or Substance Containing" LSD Should Be Read to Exclude the LSD Carrier

Unfortunately, the history of section 841 provides no specific answer to the meaning of "mixture or substance." The history contains no reference to the phrase "substance or mixture" in the context of an LSD car-

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[24] A lockstep approach to the plain meaning rule is unwarranted. The primary aim of a court should be to give effect to Congressional intent, not to enforce "plain meanings" that a rational Congress could not possibly have intended. *See California Federal Savings & Loan Asso. v. Guerra*, 479 U.S. 272, 284 (1987) (construction must follow the spirit, not the letter, of the law if a literal construction is not within the legislature's intent); *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (plain meaning rule is "rather an axiom of experience than a rule of law," and does not preclude the consideration of a statute's purpose, regardless of its literal language).

[25] This interpretation does not render the words "mixture or substance" meaningless in the context of LSD. LSD is sometimes mixed with other drugs, including amphetamines. The total weight of such mixture would be relevant for sentencing.

rier. Nonetheless, the history of section 841 does shed some light on Congressional intent.

1. *Comprehensive Drug Abuse Prevention and Control Act of 1970*

Section 841 was originally enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. The Act divided drugs by schedules, according to potential for abuse. LSD was listed in schedule I(c). That schedule listed "any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances," including LSD. Pub. L. No. 91-513, § 202 (c). Penalties for posesssion and distribution of controlled substances depended upon whether the drug was classified as narcotic or non-narcotic. *Id.*, § 401(b)(1). Since the law did not link penalties to the quantity of the drug possessed or distributed, Congress had no particular need to consider whether an LSD carrier was a "material, compound, mixture, or preparation," and it does not appear to have done so.

2. *Controlled Substances Penalties Amendments Act of 1984*

Punishments were first made dependent upon the quantity of the controlled substance possessed or distributed in the Controlled Substances Penalties Amendments Act of 1984, a chapter of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stats. 2068. The law amended § 841(b)(1) by increasing the maximum sentence for possession of 5 grams or more of LSD to 20 years. *Id.*, § 502. Although the amendment referred to "a mixture or substance containing a detectable amount of a narcotic drug" in 21 U.S.C. § 841(b)(1)(A)(i), corresponding use of the phrase "mixture or substance" did not appear in section 841(b)(1)(A)(iv) penalizing possession of LSD.

The 1984 amendments were intended to eliminate inconsistent penalties for major drug offenses and "to

provide a more rational penalty structure for the major drug trafficking offenses punishable under the Comprehensive Drug Abuse Prevention and Control Act of 1970." S. Rep. No. 225, 98th Cong., 1st Sess. 255 (1983). The amendments were designed to eliminate sentencing disparities, particularly those caused by classifying drugs as narcotic and non-narcotic. *Id.* at 256. While noting that the relative dangerousness of a drug should have a bearing on the sentence imposed for its possession or distribution, the legislature determined that "another important factor is the amount of the drug involved." *Id.* at 255.

Thus, the Controlled Substances Penalties Amendments Act of 1984 made quantity (5 grams) the trigger for enhanced penalties for possession of LSD. The Senate Committee report of a predecessor bill to the Act stated that the new enhanced penalties for large scale dealers were triggered by quantities of cocaine, PCP and LSD in an amount "approximately equal to 100,000 times the average user dosage." S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981). Five grams of LSD approximates 100,000 times the average user dosage only if the carrier is *not* included in the total weight of the drug.

Here, the petitioners possessed 5.7 grams of LSD, counting the weight of the blotter paper, but that weight represented only 1,000 doses. Accordingly, there is strong evidence that Congress, in choosing triggering weights for enhanced penalties for LSD possession, did not intend to count the weight of the carrier.

3. *Anti-Drug Abuse Act of 1986*

The current penalty structure for LSD possession and distribution originated in the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986). By creating mandatory minimum sentences for possession of specified quantities of controlled substances, Congress adopted a "market-oriented" approach to sentencing, one that based sentences on the amount of a drug "that might be con-

trolled or directed by a trafficker in a high place in the processing and distribution chain." H.R. Rep. No. 845, 99th Cong., 2d Sess. 12 (1986). The House Committee Report explained the priorities that Congress intended to set with the new amendments:

> The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. . . . [A] second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping PCP in aluminum foil, and doing so in substantial street quantities.

Id. at 11-12. The legislation attacked "major traffickers" by imposing a 10 year minimum sentence for possession of certain quantities of controlled substances, and punished retail level traffickers who deal in "substantial street quantities" by imposing a 5 year minimum sentence for possession of certain lesser quantities of controlled substances.

While the 1984 legislation enhanced penalties for possession of 5 grams or more of LSD (representing approximately 100,000 doses), the 1986 amendments enhanced penalties of the possession of a "mixture or substance containing" 1 gram or more of LSD. There is nothing in the legislative history to suggest that by adding the phrase "mixture or substance," Congress intended to impose enhanced penalties upon low level dealers, particularly those who reach the 1 gram threshhold with a relatively few doses adhered to a relatively heavy carrier.[26]

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[26] The only reference to LSD in the debates surrounding the Act did not address quantities or weights of drugs or the use of LSD carriers. (J.A. 65, Cummings, J., dissenting).

Using the ratio of 5 grams equalling 100,000 doses established in the history of earlier legislation, Congress probably intended to trigger the five year minimum sentence at approximately 20,000 doses of LSD. Reading the 1986 House Report together with the 1981 Senate Report leads to the conclusion that Congress defined the "substantial street quantities" of LSD that would trigger the enhanced penalty to be about 20,000 doses.[27] "The enhanced sentencing provisions of § 841 were not intended to reach a distributor of 1,000 or even 5,000 dosage units of LSD." *United States v. McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). Accordingly, Congress could not have intended to count the weight of the carrier in the total weight triggering an enhanced penalty.

E. Excluding the Weight of the LSD Carrier In Determining a Sentence is Consistent With the Goals of the Federal Criminal Code

1. *21 U.S.C. § 841(b)(1)*

Statutes should be construed to give effect to the purpose of the legislation. *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987). The penalty enhancements in 21 U.S.C. § 841(b)(1) are designed to punish dealers of substantial quantities of drugs more harshly than low-level retailers. Counting the weight of an LSD carrier when imposing a sentence does not effectuate that purpose. Enhancing the punishment of a person who possesses a few doses of LSD on a relatively heavy carrier, such as a sugar cube, or a retailer who possesses 200 doses on blotter paper, is not what Congress envisioned. Enhancing the punishment of those persons while failing to enhance the punishment of a dealer who

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[27] The 20,000 dose triggering weight is consistent with the number of doses of heroin and cocaine that trigger the 5 year minimum sentence under 21 U.S.C. § 841(b)(1)(A). *See Marshall*, 908 F.2d at 1335 (Posner, J., dissenting).

posseses 19,999 doses in liquid form, weighing slightly less than a grain, would contravene the purpose of the enhanced penalty structure. Counting the weight of the carrier when determining a sentence is wholly inconsistent with any rational purpose that Congress could have had.

2. *Sentencing Reform Act of 1984*

The Comprehensive Crime Control Act of 1984, which encompassed the Controlled Substances Penalties Amendment Act of 1984, also produced the Sentencing Reform Act of 1984. The Sentencing Reform Act mandated creation of the Sentencing Guidelines. Congressional intent with regard to the Sentencing Reform Act is therefore relevant to an understanding of the enhanced penalties for drug possession.

The Sentencing Reform Act was designed to "make criminal sentencing fairer and more certain." S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983).

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

Id. Accordingly, Congress directed sentencing courts to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

Congress created the Sentencing Commission to alleviate the problem of disparate sentences. 28 U.S.C. § 991(b)(1)(B). The Sentencing Commission viewed its mandate as creating "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Guidelines Manual*, § 1A3 (policy statement).

Including the weight of an LSD carrier for sentencing does violence to the concept of fair and uniform sentencing. Identically situated offenders who commit identical acts—delivery of the same number of identical doses of LSD—must be given extremely different sentences based on the arbitrary weight of the LSD carrier, if they happen to choose different carriers. If the offenders have caused the same social harm, and if they have the same criminal histories, they should, to meet the purpose of the Sentencing Reform Act, receive sentences within the same narrow guideline range. Yet judges are forced to sentence them differently if the arbitrary weights of the LSD carriers are included in the sentencing computation. It is unreasonable to think that Congress intended to promote uniform sentencing practices through the Sentencing Reform Act, while intending to subject identically situated LSD defendants to widely varying sentences based upon an arbitrary factor that bears no relevance to culpability.

F. Excluding the Weight of the LSD Carrier in Determining a Sentence is Consistent With the Principles of Statutory Construction

Three principles of statutory construction support the exclusion of an LSD carrier from the "mixture or substance containing" LSD. First, ambiguity in the application of a criminal statute should be resolved in favor of the defendant. *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Ladner v. United States*, 358 U.S. 169, 177-78 (1958). The rule of lenity applies not just to the elements of a crime, but to any ambiguity regarding the prescribed punishment. H.F. Way, *Criminal Justice and the American Constitution* 22 (1980), *citing Bell v. United States*, 349 U.S. 81, 83 (1955). Given the uncertainty that inheres in attributing to Congress a desire to enact a statute that imposes irrational punishment, the rule of lenity must apply here.

Second, statutes should be construed "to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Statutes should also be interpreted to avoid absurd, or even "odd," results. *Public Citizen v. U.S. Dept. of Justice*, —— U.S. ——, 109 S.Ct. 2558, 2566, 105 L.Ed.2d 377, 392 (1989); *Sheridan v. United States*, 478 U.S. 392, 402 n.7 (1988). Courts should not assume that Congress intended legislation to produce incongruous results. *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 412-13 (1932). It is absurd to subject equally culpable offenders to grossly disparate sentences based upon the arbitrary weight, or the absence, of an LSD carrier. Making punishments depend upon the weight of a drug carrier when the drug is not sold by weight leads to bizarre results that Congress could not have intended, and a construction that does so must be rejected.

Finally, constructions that cast doubt upon a statute's constitutionality should be avoided. *Public Citizen*, —— U.S. at ——, 109 S.Ct. at 2572, 105 L.Ed.2d at 399. As the following section of this brief demonstrates, construing the phrase "mixture or substance" to include LSD carriers would violate a defendant's Fifth Amendment right to due process of law, and the included right to equal protection of the law. To avoid declaring the penalty structure of 21 U.S.C. § 841(b)(1) unconstitutional as applied to LSD cases, the Court should hold that LSD carriers do not fall within the scope of the phrase "mixture or substance."

II. A SENTENCING SCHEME THAT REQUIRES SENTENCES TO BE BASED UPON AN ARBITRARY FACTOR VIOLATES THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND TO EQUAL PROTECTION OF THE LAW

A. The Impairment of a Criminal Defendant's Fundamental Right to be Sentenced Fairly Must be Strictly Scrutinized

Section II.B. of this brief argues that petitioners' right to due process of law, and their correlative right to equal protection of the law, was violated by setting the lengths of their sentences according to an arbitrary factor: the weight of the LSD carrier. Central to that argument is the standard by which the constitutional claim will be reviewed. In the case of economic or social legislation, a claim that a law yields arbitrary results, or that it imposes arbitrary classifications, is ordinarily reviewed to determine whether there is a rational basis for believing that the distinction challenged as arbitrary furthers a legitimate governmental interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). When the challenged distinction has an impact upon the exercise of fundamental rights, however, the legislation must be strictly scrutinized, and will survive only if the government has a substantial and compelling interest in the classification. *See, e.g., Kramer v. Union Free School District*, 395 U.S. 621 (1969) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel).

Thus, a question that must be answered before embarking on a constitutional analysis of the federal sentencing scheme as applied to LSD distribution is whether the claimed right—the right to be free from arbitrary deprivations of liberty—is fundamental. The right to liberty itself is undeniably fundamental. M. Forkosch, *Constitutional Law* § 335 at 338 (2d ed. 1969). A criminal defendant's interest in his or her liberty is of "transcending value." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

By logical extension, the right to be free from arbitrary deprivations of liberty—stated differently, the right to be sentenced fairly—must be deemed fundamental. Certainly, the right to fair treatment when the government determines the length of a sentence would be regarded by most individuals as no less fundamental than the right to travel. Freedom from imprisonment for a length of time determined by an arbitrary factor—whether the weight of an LSD carrier or the color of one's hair—must be regarded as one "of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *In re Kemmler*, 136 U.S. 436, 448 (1890).

Commentators have regarded the general right to "fairness in the criminal justice system as a fundamental right to each individual." 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 18.41 at 700 (1986) (hereinafter *Treatise on Constitutional Law*). Professor Gunther discerns a fundamental right to the "fair administration of justice" from a number of Supreme Court rulings that guarantee fair treatment in the criminal justice process.[28] G. Gunther, *Individual Rights in Constitutional Law* 407 (2d ed. 1976).

Sentencing is undeniably an important aspect of the criminal justice process. It is a critical stage at which the right to be represented by counsel obtains. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The broad right to fair and equal treatment in all stages of the

[28] *Jackson v. Indiana*, 406 U.S. 715 (1972) (invalidating distinction between pretrial commitment of incompetent criminal defendants and incompetent noncriminal detainees); *Williams v. Illinois*, 399 U.S. 235 (1970) (holding unconstitutional imprisonment for failure to pay a fine to extent that length of imprisonment exceeds maximum sentence for crime); *Douglas v. California*, 372 U.S. 353 (1963) (constitutional right to appointed counsel on appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent defendant entitled to free transcript when pursuing appeal).

criminal justice system, exemplified by the host of protections guaranteed to the criminal defendant, must certainly include the fundamental right to fair treatment in sentencing. *Treatise on Constitutional Law, supra*, § 18.41 at 703.

The right to be treated fairly at sentencing—the right to have a 20 year sentence rather than a 10 month sentence depend upon something more meaningful than the weight or absence of the carrier on which LSD is conveyed—is as fundamental as any, such as the right to counsel, that is designed to assure a fair result in the criminal courts. It cannot be impaired simply because a rational basis might be imagined for doing so. *See Marshall v. United States*, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting) (legislative classification resulting in imprisonment should not be examined under the minimal standard of rationality appropriate to economic regulation, because such a case "does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls, but the very life and health of a man caught up in the spiraling web of addiction and crime.").

The Court of Appeals appears to have relied on the Supreme Court's decision in *Marshall* for the proposition that its scrutiny of the constitutional challenge in this case should be conducted "under the highly deferential rational basis test." 908 F.2d at 1322. In *Marshall*, the Supreme Court discussed a lower court holding that there is no fundamental right to rehabilitation from narcotics addiction at public expense after conviction of a crime. The petitioner did not challenge the standard applied by the Court of Appeals and the Supreme Court did not decide the broader question of whether the right to be sentenced fairly is fundamental. 414 U.S. at 422. A holding that there is no fundamental right to drug rehabilitation at public expense offers scant support for rejecting the fundamental right to be sentenced fairly.

Thus, in deciding whether the petitioners' right to due process and equal protection of the law was violated by the challenged sentencing scheme, it is not enough to determine whether a rational basis for the scheme might be imagined. The right to be sentenced fairly is fundamental, and a legislative scheme that impairs that right can survive only if it is justified by a compelling and substantial governmental interest.

The government has no compelling interest in sentencing defendants based on the weight of the carrier to which LSD is adhered. Indeed, as Judge Posner noted, the government in the court below was unable to discern any reason for sentencing a defendant who uses a heavy carrier more harshly than a defendant who uses a lighter carrier. *Marshall*, 908 F.2d at 1333 (Posner, J., dissenting). The sentencing scheme does not survive strict scrutiny. In fact, as the following sections of this brief demonstrate, the sentencing scheme fails even the most minimal rational basis test.

B. Basing a Sentence Upon an Arbitrary Factor Violates a Criminal Defendant's Right to Due Process of Law

1. *The Fifth Amendment to the United States Constitution prohibits the arbitrary exercise of governmental power*

The due process clause is "the least specific and most comprehensive protection of liberties." *Rochin v. California*, 342 U.S. 165, 170 (1952). Due process is an elusive concept,[29] one that "has never been, and perhaps can never be, precisely defined." *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24 (1981). Due process ultimately "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque

[29] "Few phrases of the law are so elusive of exact apprehension" as due process of law. *Twining v. New Jersey*, 211 U.S. 78, 99-100 (1908).

as its importance is lofty." *Id.* While not lending itself to a precise definition, "the essential thought can be put by saying that due process has some application whenever men feel a sense of injustice." E. Griswold, *The Fifth Amendment Today* 37 (1955). The "essence of due process" bars Congress "from enactments that shock the sense of fair play." *Galvan v. Press*, 347 U.S. 522, 530 (1954).

Due process, fundamental fairness, and fair play are all concepts without clear boundaries.[30] The roots of due process, however, grow from a belief in "freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Poe v. Ullman*, 367 U.S. 497, 543 (1967) (Harlan, J., dissenting), *quoted with approval in Moore v. East Cleveland*, 431 U.S. 494, 501-02 (1977) (plurality opinion). The right to be free from arbitrary deprivations of life, liberty, or property is the core value that informs the due process clause.

Whether, and to what extent, due process includes a substantive as well as a procedural component has been the subject of enduring debate. The debate echoes through the pages of the Court of Appeals' decision below. The majority, finding that the petitioners "received ample 'process,'" construed their complaints to be about substance, and concluded that the "judicial invention" of substantive due process did not protect the defendants from the sentences imposed. *Marshall*, 908 F.2d at 1320. The dissent characterized the debate with equal candor:

> It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural

[30] The fact that the scope of the due process clause cannot be clearly defined may be one of its strengths. "In dealing not with the machinery of government but with human rights, [the] absence of formal exactitude, or want of fixity of meaning, is not unusual or even regrettable attribute of constitutional provisions." *Rochin v. California*, 342 U.S. 165, 169 (1952).

> lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as "equal protection of the laws") authorize judges to enrich positive law with moral values and practical concerns of civilized society. . . . The positivist view, applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words (taken one by one) of the relevant enactments. The natural law or pragmatist view leads to a freer interpretation, one influenced by norms of equal treatment . . . .

Marshall, 908 F.2d at 1355 (Posner, J., dissenting).

It is not always easy to separate substance from procedure. Indeed, process can itself be substantive, because fair procedures protect those substantive values, such as respect for individual dignity, that lie at the heart of the Constitution. Because process and substance go hand-in-hand, a focus on process to the exclusion of the ends it protects renders secondary those values that our society regards as primary. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1070-71 (1980).

In this case, as the majority noted, the defendants were accorded the customary procedural protections at sentencing. They had a sentencing hearing, at which they were represented by counsel. They were accorded their right of allocution. They had the opportunity to review and object to their presentence reports. Yet fair procedures may still produce arbitrary results, and it would seem strange to suggest that the Constitution sanctions sentences that are determined by a wholly arbitrary factor, simply because the sentences were the product of an otherwise fair procedure. Arbitrary results are as constitutionally offensive as arbitrary procedures.

Whatever may be said about the wisdom of using substantive due process as a vehicle for importing rights

into the Constitution that are not expressly defined in its text, it has long been recognized that the right to be free from the arbitrary exercise of governmental power is protected both in substance and in procedure by the due process clause. The due process right to be free from arbitrary assertions of governmental power is not a "judicial invention." The phrase "due process" derives from chapter 39 of Magna Carta,[31] but the belief that a governing body is bound by substantive limits can be traced to the medieval acceptance of divine law, and later to the eighteenth century philosophy of natural law. Tribe, *Substantive Due Process of Law*, in 4 L. Levy, ed., *Encyclopedia of the American Constitution* 1797, 1797 (1986).

To the American colonists, due process of law was not merely a guarantee of procedural fairness, but "a protection against arbitrary government in general." R. Mott, *Due Process of Law* 123 (1926). When the Fifth Amendment's due process clause was drafted, the substantive prohibition against governmental arbitrariness was widely understood.[32] *Id.* at 159.

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[31] "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*." *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

While the question has not been settled, many scholars have concluded from the historical evidence that chapter 39 of Magna Carta was intended to protect substantive rights. R. Mott, *Due Process of Law* 36 (1926); R. Pound, *The Development of Constitutional Guarantees of Liberty* 47-48 (1957); F. Strong, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* 5, 7 (1986); Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 301, 360, 364. Magna Carta embodied "a protest against arbitrary punishment, and against arbitrary infringements of personal liberty and rights of property . . . ." 2 W. Holdsworth, *A History of English Law* 215 (4th ed. 1936, reprinted 1966). Blackstone also suggested that the arbitrary infliction of punishment would violate chapter 39 of Magna Carta. 1 W. Blackstone, *Commentaries* *132.

[32] [T]he idea that the acts of those who wield governmental power must be reasonable, not arbitrary and unreasonable, as

Thus, whatever the limits of substantive due process might be, there is ample support for the proposition that the due process clause prohibits the government from acting arbitrarily in depriving one of life, liberty, or property. A number of commentators adhere to this view.[33] More importantly, Supreme Court decisions have historically recognized that the Constitution protects individuals from the arbitrary actions of government. *See, e.g., Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) ("the words from the Magna Charta . . . were intended to secure the individual from the arbitrary exercise of the powers of government"); *Hurtado v. California*, 110 U.S. 516, 535-36 (1884) (law "is something more than mere will exerted as an act of power. . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."); *Giozza v. Tiernan*, 148 U.S. 657, 662 (1893) ("due process of law . . . is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.")

While substantive due process has fallen into disrepute as a vehicle for prohibiting governmental regulation in

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> a legal requirement given effect in the course of ordinary proceedings in the courts, had been taken to be the law of the land or due process of law, and was held firmly by common law lawyers and courts in the seventeenth century.

R. Pound, *The Development of Constitutional Guarantees of Liberty* 103 (1957).

[33] E. Griswold, *The Fifth Amendment Today* 39 (1955) ("the very essence of liberty is the protection of the individual against arbitrary application of the collective power of the state"); L. McGehee, *Due Process of Law Under the Federal Constitution* 60 (1906) (due process restrains arbitrary or capricious action on the part of government which deprives individuals of life, liberty or property); R. Pound, *The Development of Constitutional Guarantees of Liberty* 106 (1957) (due process clause requires that governmental action "is not to be arbitrary and unreasonable").

the areas of economics and social welfare, *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970), it remains a vital check against the unbridled exercise of arbitrary governmental power. E. Corwin, *The Constitution and What It Means Today* 330 (13th rev. ed. 1973). Modern cases continue to recognize the substantive due process right to be free from the arbitrary actions of government. Thus, in the field of land use regulation, the Court will not sustain a governmental restriction if the substantive result "is arbitrary and capricious." *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976), citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).[34] Due process also prohibits the government from creating an arbitrary statutory presumption,[35] from arbitrarily excluding individuals from food stamp eligibility,[36] and from inferring arbitrarily that a need exists for high bail in a criminal prosecution.[37]

It is perhaps in the field of criminal justice that the Court must be most vigilant in its effort to assure that no person suffers from arbitrary action inflicted by the government.[38] Liberty, after all, is a "transcending value," *Speiser v. Randall*, 357 U.S. 513, 525 (1958), and the procedural safeguards that protect against arbi-

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[34] "The critical constitutional inquiry . . . is whether the zoning restriction produces arbitrary or capricious results." *Eastlake*, 426 U.S. at 675-76 n.10. *Accord, Moore v. East Cleveland*, 431 U.S. 494, 498 n.6 (1977) (plurality opinion) ("our cases [since *Euclid*] have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose").

[35] *Leary v. United States*, 395 U.S. 6, 36 (1969); *Tot v. United States*, 319 U.S. 463, 467-68 (1943); *Western & Atlantic Railroad v. Henderson*, 279 U.S. 639, 642 (1929).

[36] *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973).

[37] *Stack v. Boyle*, 342 U.S. 1, 6 (1951).

[38] The principle of due process enjoys its "fullest expression" in the criminal justice process. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 Harv. L. Rev. 904 (1962).

trary deprivations of liberty must be complemented with a substantive assurance that the results of a criminal proceeding will be fair. Thus, the Court in *Rochin v. California*, 342 U.S. 165, 169 (1952), held that the due process clause requires courts to evaluate the entire course of criminal proceedings to determine whether they offend the canons of decency and fairness that define justice. *Accord, Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (due process and equal protection clauses protect defendants against unequal treatment at all stages of the criminal justice system).

2. *Basing LSD sentences upon the arbitrary weight of an LSD carrier violates due process of law*

The protection against arbitrary action applies at the sentencing stage of a criminal proceeding. In *Gardner v. Florida*, 430 U.S. 349, 358 (1977), the Court stated that "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *See also Specht v. Patterson*, 386 U.S. 605, 610 (1967); *United States v. Malcolm*, 432 F.2d 809, 815 (2d Cir. 1970) (sentencing process must conform to fundamental principles of liberty); Comment, *Federal Sentencing Guidelines: Due Process Denied*, 33 St. Louis U.L.J. 1049, 1056 (1989) ("Due process under the fifth amendment guarantees a fair and just sentence based on substantial evidence.").

Due process shields against arbitrary or unfair decisionmaking at sentencing by requiring that a sentence not be based on an improper factor. *United States v. Wiley*, 267 F.2d 453 (7th Cir. 1959) (sentencing defendant to a longer term because he exercised his right to trial is improper). By the same token, due process must protect defendants from sentences which are based on an arbitrary factor. A fair and just sentence is one that bears some relationship to the offender's culpability, to the nature of the crime, and to the need to protect society. The weight of an LSD carrier is relevant to none of those

considerations. It is not a factor that should influence a sentence.

Although the carrier's weight effectively determines the sentence imposed, it bears no relationship to any legitimate purpose of sentencing. The purpose of the enhanced penalties under § 841(b)(1) is to punish more severely those retailers who deliver larger quantities of controlled substances. *United States v. Savinovich*, 845 F.2d 834, 839 (9th Cir. 1988); H.R. Rep. No. 845, 99th Cong., 2d Sess. 12 (1986). Basing sentences upon the weight of an LSD carrier does not rationally advance the goal of inflicting harsher punishments upon more significant dealers. Because LSD is sold by the dose, not by weight, and because the weights of carriers vary dramatically, the weight of the LSD carrier is not rationally related to the quantity of LSD distributed. A dose of LSD has the same potency and sells for the same price no matter how heavy or light the carrier might be. A retailer who sells one thousand doses adhered to blotter paper commits the same crime, makes the same profit, and causes the same social harm, as a retailer who sells one thousand identical doses adhered to gelatin capsules. The blotter paper dealer carries no greater moral fault than the gelatin capsule dealer. He cannot distribute to a larger number of consumers or increase his profits by using blotter paper rather than gelatin capsules. If the offenders are identical in all other ways, it is irrational not to sentence them within the same guideline range.

Imposing a longer sentence upon the blotter paper dealer because blotter paper weighs more than gelatin capsules is fundamentally unfair. As Judge Posner noted in dissent, "graduating punishment to the weight of the carrier medium produces, in the case of LSD, a systematically, unavoidably bizarre schedule of punishments that no one is able to justify." *Marshall*, 908 F.2d at 1337 (Posner, J., dissenting). Given that there is no logical nexus between the weight of the drug carrier and the

legislative purpose of punishing major traffickers more severely, the sentencing scheme fails even the least stringent rational basis test.

The majority opinion below suggests that the threat of arbitrary sentencing is theoretical. In fact, the LSD cases mounting up in appellate courts demonstrate that the problem is far from theoretical. Even within the class of defendants who distribute LSD on blotter paper, sentences cannot be administered fairly, because some blotter paper is heavier than others.[39]

Given the interpretation of "mixture or substance" that now prevails, arbitrary results in LSD cases are inevitable. By way of example, one thousand doses of LSD adhered to gelatin capsules in *United States v. McGeehan*, 824 F.2d 677, 680 n.4 (8th Cir. 1987) were less than half the weight of the same number of doses of LSD distributed by petitioners. In *United States v. Johnson*, 888 F.2d 1255, 1256 (8th Cir. 1989), the weight of 4,300 doses of LSD was found, for sentencing purposes, to be 430 milligrams, far less than the weight of the 1,000 doses distributed by the petitioners. Thus, the base offense levels of the defendants in *McGeehan* and *Johnson* would be less than the base offense levels to which the petitioners were subjected, despite the fact that McGeehan distributed the same number of doses of LSD as petitioners while Johnson distributed more than four times as many doses.

Basing sentences upon an arbitrary factor yields arbitrary sentences. Certainly, it must be deemed unconstitutionally arbitrary to deprive judges of any discretionary power to be fair, to *require* courts to sentence equally culpable offenders differently, yet the sentencing scheme at issue does just that. The sentencing scheme is so unsound as to "shock the sense of fair play," *Galvan*, 347 U.S. at 530, and to offend our fundamental

[39] *See* footnote 7, *supra*.

notions of due process. The government cannot be allowed to deprive an individual of liberty for a length of time that is irrationally chosen. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This is precisely the kind of arbitrary governmental decision-making that the due process clause prohibits.

3. *Basing a defendant's sentence upon the arbitrary weight of the LSD carrier violates the defendant's right to equal protection of the law*

The Fourteenth Amendment guarantee of equal protection of the law applies by its terms to the states, not to the federal government. The Fifth Amendment right to due process, however, includes an equal protection component. *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Equal protection requires legislative classifications to be reasonable in light of the legislation's purpose. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Thus, due process bars a statute that "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). *Accord, Reed v. Reed*, 404 U.S. 71 (1971) (arbitrary preference given to men over women for position as estate administrator denies right to equal protection of the law).

Equal protection requires equal treatment of similarly situated persons in the criminal justice system. "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (citation omitted). The due process and equal protection guarantees protect against unequal treatment in all stages

of the criminal justice system. *Id.* at 18. "The right to equality in the criminal justice system includes the right to fair treatment in sentencing." 2 R. Rotunda, J. Nowak, & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 18.41 at 703 (1986).

The sentencing scheme at issue here creates the "patently arbitrary classification, utterly lacking in rational justification" that *Flemming* warned against. Purveyors of LSD on sugar cubes fall into one classification. Distributors who use gelatin capsules comprise another classification. Blotter paper dealers are still another, as are candy dealers, as are the dealers who sell LSD in its liquid state. Sugar cube dealers receive longer sentences than gelatin capsule dealers for selling an equal number of doses of LSD. Blotter paper dealers get shorter sentences than if they had used sugar cubes, but longer than if they had used gelatin capsules.[40] When they sell the same number of doses, there is no rational reason to treat the members of each category differently. In fact, doing so contravenes the goal of imposing consistent sentences based on culpability shared by the Anti-Drug Abuse Act of 1986 and the Sentencing Reform Act of 1984. Treating equally situated offenders differently —not as a matter of judicial discretion, but as a matter of statutory mandate—is irrational, arbitrary, and a violation of the right to equal protection of the law.

The equal protection violation is apparent in another context. In this case, the weight of the blotter paper was known. The Sentencing Guidelines call for an initial offense level of 28 when the substance containing the LSD weighs between 4 and 7 grams. *Guidelines Manual*, § 2D1.1(c)(8). If the weight of the blotter paper had not been known, the court would have turned

[40] If the Supreme Court affirms the judgment below, one probable impact will be a move toward the use of lighter carriers. Ironically, as lighter carriers tend to be smaller and more easily concealed, this trend will simply make the drug war that much harder to win.

to the "Typical Weight Per Unit (Dose, Pill, or Capsule) Table, "*Guidelines Manual* § 2D1.1, comment. (n. 11). That table reveals that a dose of LSD weighs 0.05 milligram. One thousand doses would therefore weigh 50 milligrams. Delivery of 50 milligrams of a substance containing LSD falls within offense level 14. *Guidelines Manual*, § 2D1.1(c)(15).

An offense level of 28 carries a minimum guideline sentence of 78 months for a category I offender. An offense level of 14 carries a minimum guideline sentence of 15 months for a category I offender. *Guidelines Manual*, § 5A. Thus, because the government was able to ascertain the weight of the carrier, the petitioners were subjected to a penalty that was far more severe than would have been rendered if the government had known only the number of doses sold. Yet it is only the number of doses sold that is relevant to the determination of culpability. The vastly different sentences that can be imposed upon the defendant, depending upon whether the weight of the carrier is known or unknown, highlights the equal protection violation inherent in applying this sentencing scheme to LSD. If the petitioners had been sentenced according to the "Typical Weight Per Unit Table," without regard to the weight of the blotter paper, the Guidelines for each of them would have called for less than a five year sentence. It was irrational and unfair to enhance their sentence based upon the weight of the blotter paper.

It is this irrationality that renders the sentencing scheme unconstitutional as applied to LSD. By subjecting offenders to widely varying sentences based upon an arbitrary factor, the mandatory minimum sentences and the Sentencing Guidelines impose a substantial burden upon the right of defendants convicted of distributing LSD to be treated equally and fairly at sentencing. In order to justify that burden, the government must demonstrate that a substantial and compelling reason per-

mits sentences to be based upon the arbitrary weight of the carrier that holds the LSD. Even if the government is held to a lesser standard, and must show only that a rational reason exists to sentence identically situated offenders differently based on the weight of the LSD carrier, the statute fails, because no such reason exists.

CONCLUSION

Petitioners request that the Court construe 21 U.S.C. § 841(b)(1) and the Sentencing Guidelines to exclude LSD carriers from the phrase "mixture or substance containing" LSD. In the alternative, petitioners ask the Court to declare the statute and the Sentencing Guidelines unconstitutional under the Fifth Amendment to the United States Constitution. Accordingly, petitioners seek reversal of the judgment of the Court of Appeals for the Seventh Circuit and a remand to the district court for resentencing. The district court should be directed to sentence the petitioners in accord with the actual weight of the LSD (apart from the blotter paper) or, if necessary, to estimate that weight by use of the "Typical Weight Per Unit (Dose, Pill, or Capsule) Table" in the *Guidelines Manual*, § 2D1.1, comment. (n. 11).

Respectfully submitted,

T. CHRISTOPHER KELLY
(Appointed by this Court)
121 South Hamilton Street
Madison, Wisconsin 53703
(608) 255-6607
Counsel for Petitioners

JAN 23 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5744

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD CHAPMAN, et. al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent(s)

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF ON THE MERITS OF RESPONDENT, STANLEY MARSHALL,

In Support of Petitioners, Urging Reversal

DONALD THOMAS BERGERSON
2431 Fillmore Street
San Francisco, CA., 94115
Telephone: (415) 621-8149

Attorney for Respondent,
STANLEY MARSHALL

BEST AVAILABLE COPY

93pp

QUESTIONS PRESENTED

1. Does the phrase "mixture or substance including ... L.S.D.," the weight of which is the basis for sentence under 21 U.S.C. 841(b)(1)(A)(v), include the weight of carrier media upon which the L.S.D. is placed prior to sale?

2. Does basing a sentence on the fortuitous weight of the carrier on which L.S.D. is placed prior to sale violate the right to Due Process of Law?

3. Is there a fundamental right to "fairness" in criminal sentencing, impairment of which must be strictly scrutinized?

Additionally, Marshall propounds the following question in section IV of this brief:

4. Is a sentence based primarily on the adventitious weight of an inert substance on which an illegal drug is placed prior to sale disproportionate and thus prohibited by the Eighth Amendment?

STATEMENT OF PARTIES

Marshall was a party to the proceeding whose judgment is reviewed herein, hence is a respondent in this case under Rule 12.4.

However, because his interest is allied with that of petitioners, he submits a brief supporting their position.

The Court is advised that prior to the granting of certiorari in the instant case, Marshall submitted his own petition for certiorari which raises issues similar to those in the instant case. All parties to the instant case were served with copies of that petition, which remains pending. */

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*This unusual scenerio occurred for the following reason: Marshall was prosecuted in a proceeding unrelated to that involving petitioners. Because their separate appeals raised identical issues, their cases were con-solidated, on appeal, for decision en banc. After the Court of Appeals rendered its decision, Chapman immediately petitioned for certiorari. Marshall sought rehearing in the Court of Appeals before filng his own petition.

Should the Court be of the opinion that Marshall is not a party here despite the foregoing, he respectfully requests that he be given opportunity to file the within brief as an amicus brief.

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No. 90-5744
SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICHARD CHAPMAN, et. al.,
vs.
THE UNITED STATES OF AMERICA

BRIEF OF RESPONDENT, STANLEY MARSHALL
In Support of Petitioners,
Urging Reversal of Judgment

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported as United States v. Marshall 908 F.2d 1312 (7 Cir. *en banc.*, 1990). The opinion of the District Court in respondent's case is reported as United States v. Marshall 706 F.Supp. 650 (C.D., Ill., 1989). The opinion of the District Court in petitioner's case, (United States v. Chapman, et. al., No. 89-CR-46, W.D., Wis., 1989), is unreported.

JURISDICTION

Marshall adopts the jurisdictional statement of petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Marshall adopts the statement of relevant provisions of law as stated by Chapman.

Regarding section V of this brief, the Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Marshall was arraigned on September 8, 1988 on a superseding indictment charging him with conspiring to distribute L.S.D. during January through June of 1988 in violation of 21 U.S.C. 841(a)(1) [(count

I)]; using a communication facility during May 2, 31, and June 7 and 8, 1988 to facilitate the foregoing in violation of 21 U.S.C. 843(b), [(counts II, III, IV, and V)]; and with distributing more than ten grams of "a mixture or substance containing a detectable amount of lysergic acid diethylamide (L.S.D.)," on March 9-17, 1988, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. (Superseding Indictment).

On February 7, 1989, Marshall agreed to a bench trial and stipulated that the Government proof at trial would be, (in essence), as follows:

In March of 1988, an agent of the Drug Enforcement Agency seized an aggregate of 11751 doses of L.S.D. from Meirl Neal and Lyndon Harlow in Springfield, Illinois. (Stip. at 1-2). Harlow, cooperating with the D.E.A., named Marshall as his source, (Stip. at 3, 5), and participated in a series of tape-recorded conversations with

Marshall at which further L.S.D. transactions were discussed. (Stip. at 4) This stipulation effectively conceded all elements of all counts, save for the allegation in count VI charging that Marshall distributed "more than ten grams" of a "mixture or substance containing L.S.D.," the truth of which was the sole disputed issue at the bench trial. Both the defense and the Government produced testimony from expert witnesses on this issue.[1]

The testimony was as follows:

L.S.D. is a non-habit forming hallucinogenic drug (Tr. 31, 67), originally tested for legitimate use in psychiatry,

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[1] The Government called Richard Gelsomino, a forensic chemist with the Drug Enforcement Agency since 1972. (Tr. 6-8).

The defense called James O'Donnell, D.Pharm., a pharmacologist, pharmacist, and nutritionist, who is affiliated with Rush Medical College in Chicago and who also maintains his own consulting firm. Dr. O'Donnell has, on occasion, consulted for both the defense and for the Government. (Tr. 61-65, 79-80).

(Tr. 67), but now controlled as a schedule I substance. (Tr. 12, 15). When ingested, (Tr. 32), the drug causes sensory distortions and depersonalization which users refer to as "a trip." (Tr. 67:16).

The drug occurs as a free base which is soluble in certain organic liquids. (Tr. 38, 39, 68). L.S.D. can also be made into a tartrated salt, which can dissolve in water. (Tr. 39; cf., Tr. 68, 81).

In these forms, L.S.D. is clinically effective in incredibly small amounts. The Government's chemist testified at trial that he had personally seen doses of L.S.D. weighing as little as twenty millionths of a gram, and the strongest dose of L.S.D. he had ever encountered weighed two hundred micrograms. (Tr. 34, 37). Marshall's L.S.D. was sold in doses of anywhere from forty-five to seventy-five micrograms. (Tr.

23, 25, 52).[2]

This is so small an absolute quantity of L.S.D. that it is impossible to isolate it for actual ingestion. As such, L.S.D. is commonly placed onto "carriers" and ingested in this more tractable form.[3] Examples of these carriers are food, sugar cubes, gelatin, and extremely thin "blotter paper." (Tr. 48, 49, 77, 81, 83).[4]

Because L.S.D. is "bought and sold by

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[2] The sentencing guidelines state that an average dose of L.S.D. weighs fifty micro-grams. (U.S.S.G. 1990 Ed., 2D1.1, 2.51, "Typical Weight Per Unit Dose ... Table)." At the time of Marshall's offense, the typical weight per dose was assessed at 100 micrograms.

[3] In the words of the trial court: "The pure chemical compound of L.S.D. is extremely potent,--far too potent to be of any use to those who would ingest it. It is therefore necessary to dilute the solid L.S.D. and convert it into an easily digestible form." United States v. Marshall 706 F.Supp. 650, 652 (C.D. Ill., 1989).

[4] L.S.D. can also be mounted on tablets. Although this is rarely done, (Tr. 81), this Court has encountered at least one L.S.D.-on-tablets case. Dorzynski v. United States 418 U.S. 424, 426 (1974).

dosage units, not bought and sold by weight," (Tr. 30:24-25), the form of the specific carrier makes little difference to the consumer of L.S.D. Moreover, it is immaterial whether the carrier is ingested along with the drug. (Tr. 49). Whether blotter paper, for example, is chewed, swallowed, placed in a drink, sucked, or licked, the user will absorb the L.S.D. so long as a mucous membrane is exposed to it. (Tr. 48-49, 77, 83).[5]

In the instant case, the carrier was blotter paper. (Tr. 8, 17).

L.S.D. is applied to blotter paper by dissolving or suspending it in solution, which is in turn either dotted on the paper from pipettes, (Tr. 33), or evenly applied by dipping or spraying. The liquid portion of the solution evaporates, leaving the

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[5] The defense chemist also spoke of the possibility that the drug could be absorbed transdermally. (Tr. 77).

L.S.D. (Tr. 32-33). Tests revealed that Marshall's L.S.D. was applied through one of the methods ensuring even distribution. (Tr. 18, 33).

The Government's expert testified that he calculated drug weights in this case pursuant to a standardized Drug Enforcement Agency form which contains spaces for listing the "net" and "total net" weight of a sample. (Tr. 21, 42-43).[6]

The "total net" is the weight of the L.S.D., alone. (Tr. 46). The "total net" in this case was .67072 grams. (Tr. 47). *Not* included in this "total net" was the weight any isomers of L.S.D. which happened to be included in the sample. (Tr. 17).[7]

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[6] The form also contains a space for "gross" weight. The "gross" weight is the weight of the L.S.D., blotter paper, and the evidence envelope, (Tr. 43, 44), and does not figure in this case.

[7] An isomer is a molecule with the same chemical formula as another molecule (continued...)

The "net" weight is the weight of the blotter paper plus L.S.D. (Tr. 45). Marshall's sentence was based on this "net" weight.

When "net" weight is figured, not only the paper and the drug are weighed, but any impurities which happen to be on the paper are also weighed. (Tr. 46).

The "net" here came to 113.32 grams, which translates to .96 grams per average dose. (Slip Op. at 4, fn. 1; United States v. Marshall, supra, 908 F.2d at 1316, fn. 1).[8] The ratio of Marshall's aggregate L.S.D. to Marshall's aggregate paper was

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[7](...continued)
but in which the atoms are differently arranged in space. (Tr. 15-16). L.S.D. isomers are classed as controlled substances in the same "schedule" as is L.S.D. (Tr. 16; 21 U.S.C. sections 802(14); 812 Schd. I(c)(9)). Two blotter paper exhibits in this case showed the presence of L.S.D. isomers. (Tr. 15).

[8] Marshall's several blotter papers, although differing slightly in weight and appearance, all weighed very close to the same net-per-dose amount. (Tr. 20-29)

0.59%, i.e., Marshall's paper agglomerate was a bit over half-of-one-per-cent L.S.D.

The Government's expert testified that he included the weight of the paper into the "net" because it is "standard operating procedure," (Tr. 48:16), to do so in L.S.D. cases. In determining the weight of any drug, "[a]ll I can do is do what they tell me to do, and per their rules I have to weigh it as it comes." (Tr. 51:10-11).[9]

The defense expert testified that the blotter paper was a "vessel," (Tr. 78),[10] i.e., a "container," (Tr. 79), similar to a vial, ampule, or "patch." (Tr. 72-75). The

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[9] Procedures vary with other drugs. For example, gelatin capsules are not weighed if the drug is powdered, (Tr. 50), nor if the drug is a non-prescription (Schedule I) drug, (e.g. L.S.D.) (Tr. 56).

With cocaine, the glass vial in which the cocaine is packed is not weighed, (Tr. 50, 53), but the filler with which cocaine is "cut" is weighed. (Tr. 54).

[10] The Government's witness was equivocal as to whether L.S.D. carrier-media are "vessels." (Tr. 49-50).

blotter paper was not part of the drug, itself. (Tr. 79). Although the paper is a "substance" in ordinary parlance, (Tr. 83), it is not a "substance" in any pharmacological sense. (Tr. 86).

The trial court found Marshall guilty, holding that the blotter paper was a "mixture or substance containing L.S.D.," equivalent to the "cut" in cocaine transactions,[11] or the stalks and roots of marijuana plants. (Tr. 120-123). In a written opinion, [United States v. Marshall 706 F.Supp. 650 (C.D. Ill., 1989)], the Court elaborated on these findings.

Marshall appealed to the Court of Appeals for the Seventh Circuit. After the case was argued before a three judge panel of that Court, the Court set the matter for

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[11] The Government's expert had testified that L.S.D. on blotter paper is *not* "cut" in the same sense as cocaine is cut with filler. (Tr. 55).

argument *en banc* in conjunction with the pending appeals of Chapman, et. al. After argument, the Court of Appeals affirmed the Marshall's conviction, along with those of petitioner and his codefendants, by a six-to-five vote. This case is before the Court on Chapman's petition for certiorari.

SUMMARY OF ARGUMENT

I

Sentencing in L.S.D. cases when based on carrier weight yields freakish results. Sentence length varies radically according to an adventitious factors unrelated to criminal culpability. Smaller dealers may be punished more severely than larger ones merely because they mount their drug on a heavier package for distribution.

(A)

"Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Simpson v. United States

435 U.S. 6, 15 (1978). The "mixture or substance" language in the penalty statute (and corresponding Guidelines) is so ambiguous that the rule of lenity must be applied in this case.

(B)

The statutory language is ambiguous. Ironically, while all Courts have thus far held that the statutory language has a plain meaning, these same courts have divided as to the meaning of key words in the supposedly "plain" phrase. [E.g., compare United States v. Bishop 894 F.2d 981 (8 Cir., 1990), with United States v. Marshall 908 F.2d 1312 (7 Cir., *en banc*, 1990) regarding the definition of "substance containing."].

One reason for the confusion is that the words "substance" and "mixture" each have various "dictionary" meanings, some of which preclude deeming carrier media a "substance or mixture containing L.S.D.."

Moreover, in chemistry, "mixture containing L.S.D." may be a term of art, referring to L.S.D. tartrate, a different form of the drug.

Reasonable judges, as well as criminal justice professionals have become confused from this array of contradictory meanings of the words in the statute, which can therefore fairly be described as "ambiguous."

(C)

Even if the words of the statute were plain, the legislative history suggests that Congress did not intend to apply them to carrier media. The phrase "mixture or substance" was introduced without comment into the statute to replace somewhat different language directed at "kingpins" who diluted their drugs in order to increase the volume of sales. This consideration is irrelevant to L.S.D., which is marketed by the dose. There is nothing in L.S.D. sales

equivalent to the "cutting" of drugs such as heroin and cocaine, which was the apparent target of such language. Moreover, calculating L.S.D. sentences on the weight of carrier media punishes mid-tier L.S.D. dealers more than heroin or cocaine kingpins, a result clearly not intended by Congress, which does not appear to have regarded L.S.D. as a special menace.

(D)

The resulting punishment schedule warps the whole structure of the uniform Determinate Sentence Law. It is doubtful that Congress intended to undermine its recently and carefully architected determinate sentence scheme merely to impose long punishments in L.S.D. cases.

II

Sentencing schemes which discriminate between like defendants on the basis of arbitrary factors violate the Equal Protection component of the Due Process

Clause of the Fifth Amendment. Marshall v. United States 414 U.S. 417 (1974); Bolling v. Sharpe 347 U.S. 497 (1954). Carrier-weight-based sentencing, even if intended by Congress, violates Due Process.

(A)

A person who sells L.S.D. on blotter paper is not a worse criminal than one who sells it on a lighter medium. To distinguish between like offenders on this basis is irrational.

(B)

Distinguishing between offenders on the basis of carrier weight frustrates the whole purpose of Anti-Drug legislation. Carrier-weight-based sentencing can readily be evaded by methods which will only make the job of law enforcement more difficult in L.S.D. cases.

(C)

Nor can a rational reason for the sentencing scheme be advanced. The

Government has offered none. The Court of Appeals has offered three, but they are meritless. For example, Congress realized that L.S.D. sales were diminishing, not increasing, as of 1986, so there is no reason to conclude that it passed a law to eliminate blotter paper as the source of its "renewed success."

(D)

While Congress need not punish similar conduct identically, it is impermissible for Congress to set out, in a single sentencing statute, an irrational range of penalties. Enforcement of such irrational penalties is assailable as a violation of Equal Protection. United States v. Batchelder 442 U.S. 114, 124-126 (1979).

III

Another Due Process violation implicit in carrier-weight-based sentencing is that it fails to convey, with sufficient clarity, the consequences of trafficking in L.S.D..

Prior to any decisional law on the subject, Marshall found himself subjected to harsh and novel penalties under a newly enacted and ambiguous statute, in violation of the Due Process clause of the Fifth Amendment.

IV

Marshall joins in petitioner Chapman's contention that sentencing discriminations involve the fundamental right to "liberty" as provided in the Due Process clause. As such, statutes which impose unequal sentences on like defendants for identical crimes should be strictly scrutinized by this Court. Cases which suggest that sentencing schemes should be tested on the basis of their mere rationality did not, in fact, involve punishment schemes. Rather, they involved schemes which unequally allocated benefits, such as "good time," to sentenced inmates.

V

(A)

Marshall respectfully invokes leave by this Court to present an issue litigated below and raised by him in his own certiorari petition which, for procedural reasons, has not yet been acted on by this Court. Cf., Peters v. Kiff 407 U.S. 493, 495 (1972). He sincerely believes that this claim is important in the analysis of this case.

(B)

The Eighth, Amendment prohibition against cruel and unusual punishments is violated when adventitious conduct not related to actual culpability forms essentially the entire basis for a lengthy criminal sentence, especially when that sentence exceeds the length of sentences given to offenders who violate other comparable provisions of the same statute.

This Court has long recognized that

punishment cannot permissibly be based on non-culpable "status," Robinson v. California 370 U.S. 660 (1962)], or be unrelated to the gravity of the actual offense. Solem v. Helm 463 U.S. 277 (1983). Applying this doctrine to forfeiture, the Ninth Circuit has held that it is a violation of the Eighth Amendment to seize an entire enterprise when only a portion of it has been devoted to criminal conduct. United States v. Busher, 817 F.2d 1409 (9 Cir. 1987).

Roughly seventy-five percent of the length of Marshall's sentence is based on the weight of paper which is, of itself, probably not illegal to possess and which certainly did not add to his culpability in the instant offense. This is in violation of the prohibition against cruel and unusual punishments in the Eighth Amendment of the Constitution.

ARGUMENT

I

CONGRESS NEVER PASSED A LAW ALLOWING INERT "CARRIERS" TO BE WEIGHED WHEN CALCULATING SENTENCES IN L.S.D. CASES

Introduction: Sentencing in L.S.D. Cases Based On Carrier Weight Yields Freakish Results

Unlike most "street" drugs of abuse, L.S.D. is not marketed or consumed according to the weight of the "mixture or substance" into which it is diluted.

Instead, L.S.D. is marketed and consumed by the dose. Should weight be specified,--and there is no indication that it was specified in the instant case,--it is the weight of pure L.S.D. per dose. No "trade usage" has grown to discount for dilution of the product.[12]

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[12] This is not to say that L.S.D. might never be sold in a mixture with some other drug, e.g., with methamphetamine.

(continued...)

Nonetheless, Congress has chosen to punish transactions in L.S.D. on the basis of the weight of "mixtures or substances containing" it. 21 U.S.C. 841(b)(1)(A)(v). Corollary provisions in the Sentencing Guidelines[13] fix the precise sentence, again based on the weight of the "mixture or substance."

Since Congress is empowered to have made this choice of penalty structure, the

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[12](...continued)
But this is not at issue here. In this case, as in all of the others published on the issue posed in this case, the item marketed by the defendant appears to have been "pure" L.S.D. mounted on some sort of carrier medium. See, United States v. McGeehan 824 F.2d 677, 681 (8 Cir., 1987), cert. den. 484 U.S. 1061 (1988). United States v. Daly 883 F.2d 313 (4 Cir., 1989); United States v. Taylor 868 F.2d 125 (5 Cir., 1989); United States v. Elrod 898 F.2d 60 (6 Cir., 1990); United States v. Rose 881 F.2d 886 (7 Cir., 1989); United States v. Bishop 894 F.2d 981 (8 Cir., 1990); United States v. Larsen 904 F.2d 562 (10 Cir., 1990); United States v. Healey 729 F. Supp. 140 (D.C. Cir., 1990).

[13] U.S.S.G. section 2D1.1 at fn. "*." See, gen., United States v. Daly 883 F.2d 313, 316-317, 317, fn. 4 (1989).

wisdom of it is beyond the reach of argument in this case.

The choice has, however, presented a significant problem for the Courts. Although L.S.D. is never sold in diluted form, it is rarely sold all by itself. This is because individual doses of L.S.D. are so very light and small that they must necessarily be delivered to the consumer "wrapped up" in larger packages. The packages, referred to hereafter as "carrier media," include extremely thin "blotter paper," the carrier in the instant case.

The Government has urged in this and other cases that the phrase "mixture or substance containing L.S.D." refers to these carrier media.

If the Government's interpretation is accepted, sentences in L.S.D. cases will be based almost wholly on the weight of the "carrier media". This has three consequences.

First, sentences in L.S.D. cases will be very, very long. While typical carrier media are light, they weigh much more than does L.S.D. Gelatin is forty times heavier than the drug.[14] Marshall's blotter paper weighed a bit less than one-hundred-seventy times as much as his L.S.D.

The absolute weights specified in the sentencing statute are small, (most likely a consequence of the extreme potency of L.S.D.); a mere ten grams (a third of an ounce) triggers a mandatory ten-year minimum sentence. 21 U.S.C. 841(b)(1)(A)(v). However light a carrier may be, it is so much heavier than L.S.D. that small quantities of it can build up to ten grams quickly, and minute increments can increase sentence exposure drastically thereafter.

In the instant case, Marshall

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[14] United States v. McGeehan 824 F.2d 677, 680 (8 Cir., 1987) (gelatin tabs weigh .00225 grams per dose).

trafficked in .67072 grams of L.S.D. mounted on 112.65 grams of inert paper. Had he been sentenced for the L.S.D. alone, he would have received something on the order of five years imprisonment (and no "mandatory minimum");[15] largely on the basis of his paper, Marshall received, instead, a sentence of twenty years.

The second consequence is that sentences amongst L.S.D. dealers will vary radically not according to amount of L.S.D. sold, but according to the adventitious factor of carrier weight. Had Marshall and petitioner Chapman[16] merely switched brands of blotter paper with each other, each would have moved two spaces up or down on the

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[15] 600-800 grams of L.S.D. brings a sentence in the range specified in level 22 of the drug table. (U.S.S.G. at 2D1.1). Marshall's sentenced was adjusted upward to level 24 for independent reasons. The sentence under level 24 is 51-63 months.

[16] Again, it must be stressed that petitioner's drug dealing was unrelated to Chapman's.

sentencing table [U.S.S.G. 2 D 1.1, sentencing table],--reducing Marshall's sentence by as much as five years and increasing Chapman's sentence by two. Had Marshall placed his L.S.D. on gelatin, the aggregate would have weighed about 27 grams.[17] This would have placed him four points lower on the sentencing table, reducing his sentence by as much as eight years.

The third consequence is that L.S.D. trafficking is punished far more severely than is trafficking in other drugs, even heroin and cocaine. Marshall received a twenty year sentence for selling just under twelve thousand doses of L.S.D. mounted on just over one hundred grams of carrier. As Judge Posner pointed out in his dissent below, for Marshall to have received a comparable sentence for dealing heroin, he

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[17] Again see, United States v. McGeehan, supra, 824 F.2d at 680.

would have to have sold ten kilograms, enough for one to two million doses; the corresponding amount of cocaine (fifty kilograms) would yield from 325,000 to five million doses.[18] Even "crack" must be distributed at the fifty-thousand-dose level to fetch a twenty year sentence. (Slip Op. at 41-42; United States v. Marshall, supra, 908 F.2d at 1334, Posner, J., dissenting.).

As appears more fully below, the literalist construction of 21 U.S.C. 841(b) which yields such results is wrong. In fact, the statutory language is ambiguous and the legislative history suggests that carrier-weight-based sentencing defeats

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[18] The sources for these statistics with regard to heroin are: Platt, Heroin Addiction: Theory, Research, and Treatment 50 (2d Ed., 1986); cf., Diamorphine 63, 98 (Scott Ed., 1988)). The sources with regard to cocaine are: Washton, Cocaine Addiction: Treatment, Recovery, and Relapse Prevention 18 (1989); Cocaine Use in America: Epidemiologic and Clinical Perspectives 214 (Kozel & Adams, Eds.), N.I.D.A. Pamphlet, No. 61, 1985.

rather than furthers the expressed aims of Congress.

(A)

Construed Under the Rule of Lenity, The Law Does Not Provide For Carrier-Weight-Based Sentencing

This Court has repeatedly demonstrated a "reluctance to increase or multiply punishment absent a clear and definite legislative directive," [Simpson v. United States, supra, 435 U.S. 6, 15 (1978)], holding, instead, that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Simpson v. United States, supra, 435 U.S. at 15; United States v. Bass 404 U.S. 336, 347 (1971); Rewis v. United States 401 U.S. 808, 812 (1971).

Marshall invokes this "rule of lenity" and urges this Court to construe the statute in his favor for reasons as follows.

(B)

The Language of the Statute Is Ambiguous

Marshall turns first to the language of the statute, itself. Reiter v. Sonotone Corporation 442 U.S. 330, 337 (1979).

Several appellate cases have addressed the meaning of the phrase "mixture or substance containing" with reference to trafficking in L.S.D. In each, the Government position has been that because the words "mixture" and "substance" have plain "dictionary" definitions, the phrase "mixture or substance containing" requires no special judicial construction. E.g., United States v. Daly, 883 F.2d 313 (4 Cir. 1989), cert. den. 110 S.Ct. 2622 (1990); United States v. Bishop, 894 F.2d 981 (8 Cir. 1990). This was the position taken by the Government in opposition to the instant petition. (Brief in Oppos. at 7-9).

This lax construction of the statute

has superficial appeal, and the unanimity of appellate opinion builds confidence in it. On closer examination, however, the confidence fades.

(1)

The Phrase "Substance Containing ... L.S.D." Has Been So Variously Interpreted by Different Courts and Professionals That It Cannot Be Said to Be "Plain" or "Unambiguous"

Consider, for example, the phrase "substance containing L.S.D.." Several Courts of Appeals have taken up this literalist position: paper is a substance; when paper "contains" L.S.D., it is a "substance containing L.S.D." See, United States v. Daly, supra, 883 F.2d at 317-318; United States v. Bishop, supra, 894 F.2d at 986; see, also, United States v. Taylor 868 F.2d 125, 127 (5 Cir., 1989).

These holdings, which equate "substance containing" with "vessel containing" are problematic, because it does not appear that

Congress ever intended to include other sorts of common "vessels," such as vials or syringes, in the weight of a drug for sentencing purposes. E.g., United States v. Smith 840 F.2d 886, 888 (11 Cir., 1988), cert. den., 488 U.S. 859 (1988).[19] The list of excluded "vessels" is not restricted to hard objects, such as vials. When illegal drugs are sold in capsules *made of gelatin*, the weight of the capsules is not included in the calculation of weight for sentencing purposes. E.g., Thomas v. United States 239 F.2d 7, 8 (10 Cir., 1956). Nor does the weight of baggies in which drugs are packaged for shipment go into the

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[19] This suggests an ironic scenario. There are rare instances in which L.S.D. is legitimately possessed by research laboratories. Such "legitimate" L.S.D. is packaged in ampoules, [Wells, Psychedelic Drugs 48 (1974)]. If "mixture or substance" includes blotter paper but not ampoules, dealers who steal L.S.D. to sell it are rewarded for their theft with a significantly reduced sentence.

calculation of weight for sentencing purposes. United States v. Luster 896 F.2d 1122, 1127 (8 Cir., 1990). Only in L.S.D. cases does the Government argue that gelatin or packaging materials are "substances containing" the illegal drug.[20]

The Court of Appeals in the instant case refused to construe the phrase "substance containing" as broadly as did the Daly and Bishop Courts, citing to the absurdity of weighing a single dose of L.S.D. "contained" in a heavy glass bottle or a jetliner for distribution. (Slip Op. at 7; United States v. Marshall, supra, 908 F.2d at 1317).[21]

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[20] In this case it appears that the Government chemist excluded some packaging materials from his net weight calculation. This apparent recognition that at least some packaging materials cannot figure in the sentencing calculus only underscores the inconsistency of weighing others.

[21] It is well known that cocaine and heroin dealers sometimes, when caught, swallow the balloons into which they have (continued...)

The Seventh Circuit was, of course, correct in this regard. But the point here is not only that a narrower reading of the phrase "substance containing" is the correct one, but that the phrase "substance containing" is sufficiently ambiguous that various Courts have disagreed over its definition, although each has proclaimed it to have a plain meaning.

In fact, "substance" has two different and incompatible meanings. "Substance" refers either to the unchanging essence of a thing or to any material object, however

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[21](...continued)
placed the drug for shipment. If such a dealer is thereafter captured, literal application of the phrase "substance containing" would require the arresting agency to weigh the dealer. This also might occur in L.S.D. cases. Grinspoon & Bakalar, Psychedelic Drugs Reconsidered, p. 77 (Basic Books, 1979), report that L.S.D. used to be smuggled inside the fingernails of distributors. (See, also, Tr. 77).

alloyed or composite its composition may be.[22] Only under tne latter, broader, meaning does the phrase "substance containing" refer to a carrier medium on or in which L.S.D. has been placed.

Under the first meaning, a "substance containing L.S.D." is something which is "essentially" L.S.D., for example L.S.D. in solution or an "isomer" of L.S.D. This was the sense to which the Government's own chemist below repeatedly referred to the L.S.D. (E.g., Tr. 8:24, 9:2-3, 11:4, 15:3).[23] This was also the sense in which the word was used in United States v.

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[22] Black's Law Dictionary (6 Ed., 1990) contains only the first definition, defining "substance" as the "[e]ssence as distinguished from the form." If blotter paper is the "form," and L.S.D. is the "essence," blotter-paper-plus-L.S.D. is not a "substance" containing L.S.D. under this definition of "substance." The dictionary does not define "mixture."

[23] Further to complicate matters, on one occasion, he referred to the blotter paper as a "material," (Tr. 9:16 and 20-21), although on another he referred to the L.S.D. at the "material." (Tr. 11).

Healey 729 F. Supp. 140, 142 (D.C. D.C., 1990), which reasoned that "a substance is a "species of matter of a definite chemical composition, or "[a]ny particular kind of corporeal matter" ..." By contrast, "[a] piece of paper soaked in ink, beer, or L.S.D. is not a kind or species of matter." United States v. Healey, supra, 729 F.Supp. at 142. While such a piece of paper might be a "substance" in a loose sense, it is conceptually opposite to a "substance" in the narrower sense of "substance"-as-"essence".

In sum, the phrase "substance containing L.S.D." is an ambiguous one because "substance" has two plain, but contrasting meanings.

(2)

The Phrase "Mixture Containing" Is Also Ambiguous

Nor have Courts had much more luck

with "mixture."

In common parlance, "mixture" means a commingling of compounds.

Here, the Court of Appeals used the term in a somewhat odd sense. The Court reasoned that when L.S.D. in alcohol is applied to blotter paper, the alcohol evaporates, leaving the L.S.D. not "on," but "in" the paper. "You cannot pick a grain of L.S.D. off of the paper. Ordinary parlance calls the paper containing tiny crystals of L.S.D. a mixture." (Slip Op. at 7-8; United States v. Marshall, supra, 908 F.2d at 1317).

This definition is "odd" because the Court of Appeals has not described a true mixture. "Mixture" means reciprocal blending; a salad is "mixed" because the ingredients are distributed amongst each other. According to the Court of Appeals, when L.S.D. is placed on blotter paper, the L.S.D. is "mixed" with the blotter paper,

but not vice-versa, i.e., there is no blotter paper in the L.S.D. In this sense, the L.S.D.-plus-paper agglomeration differs substantially from, for example, a cocaine-plus-manitol combination, which is a true "mixture."

Moreover, the distinction between L.S.D. "in" the fibers of the paper as opposed to "on" them is an odd one; one is hard pressed to fathom why Congress chose to increase drug penalties on the basis of it, since it is of no practical importance. The Government's own chemist testified at trial that if L.S.D. cannot be "picked" off of paper, it can be "licked" off of it.[24] (Tr. at 48). To say that a chemical is a "mixture" with paper because it must be removed with a tongue rather than with a

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[24] Actually, he never said that L.S.D. can *not* be "picked" off of paper. This appears to be a fact which first appears in this record in the opinion of the Court of Appeals.

hand is akin to saying that a lightbulb is a "mixture" with a socket because it cannot be pried out, but must be unscrewed.

But even if the definition of "mixture" adopted by the Seventh Circuit were correct, it would not be dispositive. Again, the problem is that in common speech, the term "mixture" has divergent practical applications. Sometimes "mixture" refers to a blending of ingredients which retain separate identities. But in everyday speech, "mixture" may also refer to the degree of purity possessed by a single item, e.g. the "fuel mixture" required to make an engine run well.

Even if L.S.D.-plus-paper were a mixture in the sense of a blend, it is not a "mixture" in the other sense. In chemistry, however, there *is* a "mixture" of L.S.D. -- i.e. an impure form of it --which is so common that a reasonable mind might think that Congress was referring to

it when it added the "mixture" language to section 841(b). As discussed by the Government's expert at trial, L.S.D. occurs in both a "free base" form and in the form of a tartrated salt. A tartrated salt is a "mixture" of the alkaloid L.S.D. and an acid, in this case tartaric acid. Windholz, et. al., Eds., The Merck Index, Tenth Edition (1983), pp. 805-806; Claus, Ed., Gathercoal & Wirth's Pharmacognosy, p. 508 (3d Ed., 1956, Lea & Febiger, Publishers). This tartrated salt, a common drug of abuse which has long been listed (along with L.S.D.) as a controlled substance in schedule I, [21 U.S.C. 812(c)I(c)(9)], is about twice as heavy as is pure L.S.D.. Merck Index, supra. Readily soluble in water, [United States v. Healey, supra, 729 F.Supp. at 141], dealers like it because it is stable, soluble, and

thus easy to prepare for distribution.[25]

When the Government's chemist at trial used the term "mixture," (to say that Marshall's L.S.D. was "pure" and not a "mixture," (Tr. 11:18)), he may have been referring to the distinction between "freebase" L.S.D. and L.S.D. "tartrate."

The significance of the seemingly arcane distinction between L.S.D. and L.S.D.-tartrate is that between the initiation of weight-based penalties for drug dealing in 1984,[26] and the enactment of the "mixture or substance language in 1986, persons trafficking in this heavier "salt" of L.S.D. might have claimed

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[25] An L.S.D. salt need not, of course, be tartrated. There are as many "mixtures containing L.S.D." in terms of this definition as there are acids to add to the alkaloid. Dictionary of Organic Compounds v. 4, p. 3605 (5 Ed., 1982, Chapman & Hall, Publishers).

[26] Comprehensive Crime Control Act of 1984; Pub. L. No. 98-473, 98 Stats. at Large 2068.

something of a "free ride." "Schedule I," [21 U.S.C. 812(c)I(c)], banned, *inter alia*, "salts, isomers, and salts of isomers of. . .(9) lysergic acid diethylamide, and 21 U.S.C. 841(a) banned trafficking in substances controlled under, *inter alia*, schedule I. However, sentences (prior to 1986) were calculated not on the basis of the weight of the somewhat heavier "salt" of L.S.D., but on the weight of the pure "L.S.D. freebase" contained in the salt, i.e., on the weight of "L.S.D." Fmr. 21 U.S.C. 841(b)(1)(A)(iv) (Supp. III, 1982). A rational interpretation of the phrase "mixture containing L.S.D." is that Congress intended that persons trafficking in L.S.D.-salts would be punished for the whole weight of the salt, rather than for the lesser weight of the "pure freebase" L.S.D.

contained therein.[27]

Here, the trial court apparently thought of "mixture" in this second sense, i.e. as an index of purity.[28] Using this definition, the trial judge wrote that Marshall's paper-plus-L.S.D. was not a mixture. By contrast, the Court of Appeals

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[27] A "hypothetical" illustrates the point. To prevent high blood pressure, Congress bans trafficking in sodium. Later, realizing that sodium is commonly distributed in the form of table salt, Congress bans distribution of "mixtures" containing sodium. Although sodium chloride (salt) is clearly a mixture, no one would think of weighing the t-bone steak upon it had been sprinkled as a means of determining the weight of the sodium mixture. Yet this is precisely what is occurring in L.S.D. cases.

[28] "If the legislature had intended merely to go after L.S.D. regardless of its purity, it could have stopped with the word "mixture" .... But the legislature went on and included the words "or substance containing a detectable amount of" L.S.D. This latter phrase goes beyond merely <u>the mixture of the drug itself</u>,--it clearly contemplates the medium in which the drug is ingested, be it paper, sugar cube, chocolate chip cookies, or any other 'substance.'" <u>United States v. Marshall, supra,</u> 706 F.Supp. at 653.

held explicitly that it was. Again, the point here is not merely that one court was right and the other wrong, but that two courts disagreed over the meaning of a word that both proclaimed to have an obvious meaning.

In sum, courts which agree that the phrase "mixture or substance" is unambiguous, <u>disagree</u> as to the meaning of key words in the words in the phrase. Such disagreement is inevitable in light of the dichotomies in the dictionary definitions of both "mixture" and "substance" and in light of the real-world fact that "mixture containing L.S.D." might well refer to L.S.D.-tartrate as opposed to blotter paper. It thus defies the lessons of two years of appellate litigation to say, as does respondent, that there is ""no ambiguity" in the language of the statute or the Guideline." (Brief in Oppos. at 9). The

"words of the statute themselves," are ambiguous.

Courts are not alone in their confusion. The United States Sentencing Commission has expressed some measure of bewilderment concerning application of the "mixture or substance" language in L.S.D. cases. On November 30, 1988, the Commission noted that construction of the phrase was one of the "Questions Most Frequently Asked" of the Commission. On March 3, 1989, the Commission solicited comments on whether blotter paper ought to be weighed with the L.S.D. 54 Fed. Reg. 41, p. 9136. After comments were received, the Chairman of the Commission wrote to Senator Biden expressing perplexity that persons dealing one hundred doses of L.S.D. on different media would be sentenced at level 12 (10-16 months) for pure L.S.D.; 26 (63-78 months) for paper; and 36 (188-235 months) for sugar cubes. See, United

States v. Daly, supra, 883 F.2d at 316. The Commission's uncertainty further demonstrates that the statutory language is unclear,--even to sentencing professionals.

(C)

The Legislative History Does Not Support a Carrier-Weight-Based Sentencing Scheme

Nor does the legislative history lend support to carrier-weight-based sentencing. If anything, the history suggests a far different intent.

(1)

Congress Did Not Intend a Drastic Increase in Punishment For Street Sales of L.S.D.

The "mixture or substance" language was added to section 841(b) as part of the Anti-Drug-Abuse Act of 1986.

The words "mixture or substance," themselves, do not appear to have been the

subject of much formal discussion in the Congress. They first appear as part of the text of the Senate Bill [S. 2870, §1002. See, 132 Cong. Rec. S. 13649] proposed after the House Judiciary Committee had already discussed and reported on precursor language, the phrase "mixture, preparation or compound." [H.R. Rep. No. 845, 99 Cong. 2d Sess., Pt. 1, at 11-12 (1986)].[29]

The phrase "mixture, preparation or compound" was introduced in support of "[o]ne of the major goals of this bill, ... to give greater direction to the D.E.A. and the U.S. Attorneys on how to focus scarce

[29] Marshall assumes for the sake of this discussion that the underlying intent of both the House and Senate language was the same.

law enforcement resources." (page 11). The Committee directed primary focus on "major traffickers, the manufacturers or the heads of organizations who are responsible for creating and distributing very large quantities of drugs." (page 11). With regard to these, "the Committee selected quantities which if possessed by an individual would likely be indicative of operating at ... a high level. The Committee's statement of quantities is of mixtures, compounds or preparations that contain a detectable amount of the drug,--these are not necessarily quantities of pure substance." (page 12). "The Committee [also] determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping pcp in aluminum foil, and doing so in substantial street

quantities." (page 12).[30]

Interrelated inferences can be drawn from this language.

First, in the Committee's text, "mixture," accompanied by the words "compounds" and "preparations," suggests "mixture" in a "chemical" sense, i.e., the sense of L.S.D. as a tartrated salt or some adulterated form.[31]

Second, although the 1986 legislation was passed in the charged atmosphere of an incipient "war on drugs," nothing in the House Report indicates that the primary purpose of the "mixture or substance" language was to increase penalties for drug dealing.[32] Rather, the goal of the statute

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[30] Senator Byrd echoed this two-tier approach in comments he made to the Senate. 132 Cong. Rec. S. 14301 (9/30/1986).

[31] "Substance," as used by the Committee, denotes the drug, itself.

[32] Indeed, at low rates of dilution, the potential punishment for cocaine and (continued...)

was to assist the justice system in differentiating amongst the occupants of different tiers of the distribution chain. Inclusion of the "mixture or substance" language was designed to foster this goal by, *inter alia*, referring more realistically to drugs in the form in which they were routinely trafficked in bulk.

With this goal in mind, the Committee differentiated between manufacturers and "king pins" who <u>create</u> and distribute <u>large quantities</u> on the one hand, and "managers of the retail traffic" who <u>package</u> drugs, on

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[32](...continued)
heroin dealing may have <u>decreased</u> under the new law, (although it became more certain).
Compare the threshold amounts for high tier treatment under Fmr. 21 U.S.C. 841(b)(1)(A)(i) and (ii), (Supp III, 1982), (100 grams of opiates or 1000 grams of cocaine), with those in current 21 U.S.C. 841(b)(1)(A)(i) and (ii), (1000 grams of "mixture or substance containing heroin" and 5000 grams of a "mixture or substance containing cocaine.)." Under the new statute, one can, for example, traffic in four times the amount of 80% pure cocaine under the 1986 amendments than under the 1984 law before stepping into the high tier.

the other. "Manager of the retail traffic" more accurately describes what Marshall did than does the phrase "major trafficker, manufacturer, or head of organization." Marshall's crime was not to direct a large organization supplying an entire region or regions; Marshall's role was that of a "hands-on" packager of the drug in the form in which it ultimately was sold to consumers in "substantial street quantities."

Marshall has already mentioned in the Introduction to this section of the brief that weighing the carrier for sentencing purposes in this case has placed him at a sentence level otherwise reserved for heroin and cocaine "kingpins" trafficking in millions of doses.

By contrast, weighing the L.S.D. alone would have placed Marshall right about where he belonged: at or near the sentence levels reserved for mid-tier dealers. Section 841(b)(1)(B),-- the section designed to

punish "the managers of the retail traffic,"--imposes five year (or greater) sentences on persons who deal heroin in the 10,000 to 20,000 dose range, and cocaine in the 3250 to 50,000 dose range. This approaches the range of doses that Marshall sold. It is no coincidence that the amount of L.S.D. listed in section 841(b)(1)(B) is one gram, which (according to the "Typical Weight per Dose" table) yields 20,000 doses; both figures correspond to the amount of "pure" L.S.D. and the number of doses of L.S.D. in the blotter paper sold by Marshall.[33]

It is true that in setting up the range of penalties, "the Committee has not generally related. . . quantities to the number of doses of the drug that might be present in a given sample," (H.R. Rept. No.

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[33] The match is only approximate; Marshall's drug trafficking was slightly under the statutory level.

845, supra, at page 12), nor would the committee have been required to do so.[34]

But to construe the "mixture or substance" language as deliberately intended to "warp the statutory design" (Slip Op. at 44; United States v. Marshall, supra, 908 F.2d at 1335), by punishing L.S.D. sales far more severely than trafficking in heroin or cocaine, there must appear on the record some indication that Congress viewed L.S.D. as a greater problem than those other drugs. There is no such indication in the legislative history, and, indeed, all indications are to the contrary.

It appears that L.S.D. was mentioned only once during the six weeks of debate concerning the Anti-Drug bill, when Senator Harkin mentioned that L.S.D. use was holding

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[34] Indeed, even prior to enactment of the "mixture or substance containing" language, L.S.D. trafficking was punished by weight, not by the dose. E.g., Fmr. 21 U.S.C. 841(b)(1)(A)(iv) (Supp. III, 1982).

steady or declining; this comment was not even occasioned by the "mixture or substance" language, but was directed at a wholly unrelated portion of the bill.[35] It appears, further that only one other Senator made reference to L.S.D. during the 1986 legislative years.[36] As has already been discussed, there is no particular reason to suppose that the "mixture or substance"

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[35] Harkin was commenting on a measure to exhort the entertainment industry to refrain from glamorizing drugs.

[36] Senator Paula Hawkins remarked on several occasions that L.S.D. was occasionally being used in conjunction with other drugs. E.g., 132 Cong. Rec. S. 9522 (July 15, 1986) (reference to "space-basing" of crack cocaine mixed with P.C.P. or L.S.D.). Although Hawkins' remarks were not made during debate of the Anti-Drug bill, itself, they may shed some light on the sort of "mixtures" that Congress contemplated.

In any event, the total record does not indicate that Hawkins believed L.S.D. to be a particular problem. Twice, she commented on the record that its use was declining, --"substantially", [132 Cong. Rec. S 9049 (July 23, 1986)], and "markedly," [132 Cong. Rec. S. 16203 (October 14, 1986)].

language was designed to increase the penalty for trafficking in any drug; clearly no such intent appears regarding L.S.D.

(2)

The "Mixture or Substance" Language Was Targeted at Cocaine Dealing, But L.S.D. Does Not Resemble Cocaine

By contrast, in 1986 Congress was obsessed with the cocaine and heroin trade, which figured prominantly in the anti-drug debate.[37] The meaning of the phrase "mixture or substance" with regard to heroin

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[37] A sampling of the first day's House debate is instructive. (All citations are to 132 Cong. Rec. H., Sept. 10, 1986). Representative Gingrich mentioned cocaine and heroin (6523); representative Dioguardi mentioned crack (6526); representative Biaggi mentioned cocaine, heroin, and marijuana (6532); representative Trafficante mentioned addicts and cocaine (6534); representative Wyden mentioned cocaine and heroin (6558).

Particularly ironic was the comment of representative Jeffords, who stated that he had been in the Vermont Attorney General's office during the drug crisis of the 1960s and early 1970s. L.S.D., of course, was rampant then, but not apparently now. "Here we are again, many years later, faced with a drug crisis, but the problem now is cocaine, a much more serious drug." (6574).

and cocaine is, of course, clear. A particularly pernicious aspect of the cocaine and heroin traffic is that dealers increase the volume of available contraband by "cutting" the pure drug with filler.

The problem with interpolating a reference to dealers who place L.S.D. on paper or gelatin into a debate concerning dealers who "cut" heroin or cocaine with dilutant "filler" is that L.S.D. is not "cut" in the same sense as are heroin or cocaine.

In the first place, cocaine as possessed by mid and high-end dealers is roughly 90% pure. [E.g., United States v. Kidder 869 F.2d 1328 (9 Cir., 1989) (cocaine 88-93% pure); United States v. Savinovich 845 F.2d 834 (9 Cir., 1988) (cocaine, 87%-95% pure); United States v. Zavala 853 F.2d 1512 (9 Cir., 1988) (cocaine, 86% pure); United States v. Holmes 438 F.2d 1175, 1176

(11 Cir., 1988) (cocaine, 87% pure).[»] By contrast, Marshall's L.S.D.-plus-paper aggregate was only about six tenths of one percent pure.

Second, when cocaine and heroin are "cut" to forms of less than 80% - 90% purity at the "street" level, the dilution is undertaken for a different purpose (and with a different result) than is the mounting of L.S.D. on carriers. The purpose of "cutting" cocaine and heroin is to increase the absolute amount of adulterated drug in

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» Nor does the result differ with other drugs.

United States v. Bayerle 898 F.2d 28, cert. den. 59 USLW 3223 (4 Cir., 1990) involved 50%+ pure dilaudid; but careful calculation shows that Bayerle could have received virtually the same sentence for a pure sample. In United States v. Baker 883 F.2d 13 (5 Cir., 1989), 11 oz. of 100% pure methamphetamine was combined with a 1-23% pure "mixture" to produce an aggregate amount for sentencing purposes. However, (unlike L.S.D.), the guidelines makes a purity- adjustment for methamphetamine, so Baker ended up receiving a lesser sentence for the combined sample than she would have received for the pure drug, alone.

circulation. Mounting L.S.D. on carrier media merely makes fixed doses of the drug more tractable for consumers. Again, the basic difference is that cocaine and heroin are sold by weight- of-mixture, but L.S.D. is not. The "purity" of the dose relative to the carrier medium is irrelevant to the L.S.D. consumer.

Even if blotter paper can be crammed into a procrustean analogy with the "cut" used in cocaine transactions, the analogy would not matter for three reasons.

First, there is no indication that Congress, itself, meant to make the analogy. The language of House Report 845 indicates that Congress was clearly aware of the role of "cut" in cocaine and heroin trafficking. It is questionable whether Congress was similarly aware of the role of carrier media in L.S.D. cases. Even if it was thus aware, it is by no means clear that anyone in Congress analogized L.S.D. carriers to the

dilutants used to increase the street supply of other drugs. And there is simply no evidence that in using the phrase "mixture or substance," Congress meant to refer to carrier weight, or to base punishment in terms of it.

Second, even if one could analogize carrier media to "cut," the statutory language, itself, remains ambiguous, for reasons discussed in subdivision (B) of this argument, i.e., that the words "substance" and "mixture" are susceptible of various interpretations. Analogy to "cut" does not make the "dictionary" or scientific meanings of "mixture" or "substance" any clearer. Statutes do not govern by analogy; they govern by clear and unambiguous command. No such command was made in the statute here.

In sum, it does not appear that Congress intended the phrase "mixture or substance" to refer to carrier media in

L.S.D. cases.

(D)

Congress Did Not Wish to Undermine The Determinate Sentencing Act By Weighing Carrier Media in L.S.D Cases

A further indication that Congress did not intend that carrier media be weighed in calculating sentences in L.S.D. cases is that to do so would frustrate the structure of the Determinate Sentence Act; the Guidelines promulgated thereunder; and the work of the Sentencing Commission.

The Determinate Sentence Law was promulgated for a number of reasons, an extremely important one of which was to insure uniformity in the sentencing process. 18 U.S.C. 3553(a)(6). The United States Sentencing Commission was chartered, in part, to implement this aim. 28 U.S.C. 991(b) (1)(B).

In establishing drug sentence guide-

lines, the Commission purported to have adhered to this statutory mission. In its comment on the drug-table, the Sentencing Commission stated that "[o]ffenses under 21 U.S.C. §§ 841 and 940 receive identical punishment based upon the quantity of the controlled substance involved .... The base offense levels in § 2D1.1 [the Drug Table] are either provided directly by the Anti-Drug Abuse Act of 1986 *or are proportional to the levels established by statute, and apply to all unlawful trafficking.* (emph. added). See, also, Comment, U.S.S.G., at A(3), p. 1.2: "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." See, also, 28 U.S.C. 991(b)(1)(B).

The determinate sentence law does not require equal sentences for the respective drugs, nor does it require that L.S.D.

dealers be sentenced by the dose. But the foregoing pronouncements indicate that some degree of systemic uniformity was contemplated for the drug-sentence scheme as a whole. At very least, it appears that Congress and the Commission intended to treat offenders who traffic in identical amounts of a single drug comparably to one another.

Carrier-weight-based sentencing warps this entire scheme.

In the first place, as previously shown, it punishes L.S.D. at an exaggerated level relative to other drugs, at variance with the proportionality language quoted above.

Second, as has also been shown, basing punishment on carrier-weight differentiates between various L.S.D. dealers in a perverse manner that is completely out of keeping with the spirit of uniform determinate sentencing.

Marshall has already illustrated the discrepency in this particular case by the hypothetical exchange of his paper with Chapman's. But the perversity plagues all aspects of carrier-weight-based sentencing. The range in weights amongst commonplace L.S.D. "carriers" is from 0.00225 gm./dose for gelatin, [United States v. McGeehan 824 F.2d 677, 680 8 Cir., 1987)], to 0.016 gm./dose for the blotter paper used in United States v. Rose 881 F.2d 386, 387 (7 Cir., 1989). A dealer can receive a ten year mandatory minimum sentence with a mere 600+ doses by using Rose's blotter paper or by using 4200+ doses with McGeehan's gelatin. (Marshall would have qualified for the ten year minimum with 1060 doses of his lightest blotter paper).[39]

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[39] The problem is magnified outlandishly when sugar cubes,--another common carrier medium, [see, United States v. Marshall, supra, 706 F.Supp. at 652],--are used. A sugar cube weighs 2.2 (continued...)

An even greater discrepancy results when an identifiable amount of L.S.D. is sold, but no contraband is recovered. Then, and only then [United States v. Bishop, supra, 894 F.2d at 987], sentences are calculated in accordance with a table of "Typical Weight Per Unit," U.S.S.G. 2D1.1. L.S.D. weighs .05 mg. per dose according to this table. Under this system, had Marshall's L.S.D. actually entered the stream of commerce, and been consumed (presumably the very thing the drug laws were designed to prevent), Marshall would have been "rewarded" with a sentence of no more than seventy-eight months -- less than

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[39](...continued)
grams, and dealing 50 doses of L.S.D. on sugar cubes, (i.e., 110 grams of sugar plus L.S.D.), can fetch a twenty year sentence.

Tablet-cases, one of which appeared before this Court as recently as 1974, [Dorzynski v. United States, supra, 418 U.S. 424], also present a magnified instance of the problem of carrier-weight- based sentencing.

a third of what he actually received.

This produces a crazy-quilt of sentences even in "ordinary" L.S.D. cases in which paper or gelatin is used as a carrier. Sentences can vary by four or more sentence-table-levels merely on the fortuity of what carrier medium is selected by the dealer. Indeed, the weight of the carrier medium accounts for virtually the entire length of any sentence in a typical L.S.D. case. As Judge Posner sardonically remarked, "Congress might as well have said: if there is a carrier, weigh the carrier and forget the L.S.D." (Slip Op. at 40; United States v. Marshall, supra, 908 F.2d at 1333).

It is unlikely that Congress would scuttle the whole Determinate Sentence Law with regard to L.S.D. a mere two years after promulgating that law for all criminal offenses. More likely, Congress never intended that carrier-weight form the basis for sentencing in L.S.D. cases.

Interim Conclusion

"Federal crimes ... "are solely creatures of statute." Liparota v. United States 471 U.S. 419, 424 (1985), citing United States v. Hudson 7 Cranch 32 (1812). Accordingly, when assessing the reach of a federal criminal statute, we pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. .... "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." Williams v. United States 458 U.S. 279, 290 [(further citations omitted)]." Dowling v. United States 473 U.S. 207, 213- 214 (1985). Congress has not spoken clearly here. The language of the statute is ambiguous; the

intent of Congress, delphic. Stanley Marshall ought not to be serving a twenty year sentence on the basis of so unclear an expression of will.[40]

II

CARRIER WEIGHT BASED SENTENCING VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY DEPRIVING CRIMINAL DEFENDANTS OF EQUAL PROTECTION OF THE LAWS FOR IRRATIONAL REASONS

Introduction

Sentencing schemes which discriminate irrationally between classes of offenders violate the equal protection clause of the

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[40] Two other canons of statutory construction militate in favor of Marshall's position. First, statutes should be construed to avoid absurd results. Sheridan v. United States 487 U.S. 392, 402, fn. 7 (1988). Second, constructions which cast doubt on Constitutionality should be avoided. As Marshall demonstrates in the following sections of his argument, construction of the phrase "mixture or substance containing" to include carrier media raises significant Constitutional problems.

Fourteenth Amendment. Eisenstadt v. Baird 405 U.S. 488 (1972); see, also, Marshall v. United States 414 U.S. 417 (1974); McGinnis v. Royster 410 U.S. 263 (1973).[41]

In Bolling v. Sharpe 347 U.S. 497 (1954), this Court recognized that the Due Process clause of the Federal Constitution operated to guarantee equal protection of the laws in jurisdictions not directly covered under the parallel Fourteenth Amendment guarantee.

Even assuming, (for the sake of argument), that Congress did intend to base

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[41] This Court cannot, of course, review the discretion exercised by individual judges within the bounds of a Constitutional sentencing statute. Williams v. Illinois 399 U.S. 235, 243 (1970); Williams v. New York 337 U.S. 241, 248-249 (1947). At issue here is not, however, individual sentences, but an entire criminal sentencing scheme. Cf., Mullaney v. Wilbur 421 U.S. 624, 696-697, 697, fn. 23 (1975), citing United States v. Tucker 404 U.S. 443 (1972). This Court has held that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process clause." Gardner v. Florida 430 U.S. 349, 358 (1977).

sentences in L.S.D. cases on the weight of carrier media, such a sentencing scheme in L.S.D. cases offends against the equal protection component of the Federal Due Process clause.

As appears below, that scheme makes no sense at all. "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant." (Slip Op. at 39; United States v. Marshall, supra, 908 F.2d at 1333, Posner, J., dissenting). For this reason, the carrier-weight-based sentencing scheme in L.S.D. cases cannot stand up to even minimal rationality review.

(A)

Carrier-Weight-Based
Sentencing Irrationally
Distinguishes
Amongst Identical Defendants
Who Commit Identical Crimes

Discussion in section I of this brief has illustrated the inequalities implicit in

carrier-weight- based sentencing. Sentences rocket up or down the sentencing table depending on a wholly adventitious factor.

Nothing in the crime of selling L.S.D. warrants distinguishing amongst carrier media to which the drug happens to be applied. As previously explained, the type of carrier onto which a dose of L.S.D is mounted is irrelevant to the consumer of the drug. "A person who sells L.S.D. on blotter paper is not a worse criminal than one who sells the same number of doses on gelatin." (Slip Op. at 39-40; United States v. Marshall, supra, 908 F.2d at 1333, Posner, J., dissenting).[42] Indeed, a dealer is unlikely even to be aware of the weight of the carrier. Petitioner, who sold an aggregate weight of four ounces of drug-

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[42] Nor is the dealer who manages to flush away his drugs before the D.E.A. arrives, and thus reap the benefit of "Typical Weight Per Dose" sentencing [United States v. Bishop, supra, 894 F.2d at 987], a better person.

plus-carrier, probably would not have noticed had his carrier been marginally lighter or heavier, yet he would have received a lesser sentence had his aggreggate amount of paper been less than half an ounce lighter.

But under the sentencing scheme championed here by the Government, persons who traffic in identical amounts of L.S.D. receive radically different sentences based entirely on the varying weights of the media on which those doses happen to be mounted.

(B)

These Sentencing Inequalities Are Not Rationally Related To The Purposes of the Anti-Drug Statutes

It has thus been established that carrier-weight-based sentencing is premised on a fortuitous distinction. The next question for analysis is whether this "distinction ... [has] some relevance to the

purpose for which the classification is made," [Baxtrom v. Herald 383 U.S 107, 111 (1966); see, Eisenstadt v. Baird, supra, 405 U.S. 438], without which it must be held to violate the Due Process Clause.

As appears below, not only does carrier-weight-based sentencing fail to further the aim of the anti-drug legislation of which it was a part, but it in fact frustrates such laws.

The aim of the Anti-Drug Act of 1986 was to punish "kingpins," especially those dealing heroin and cocaine, and, to a lesser extent, of punishing "managers of retail traffic" distributing "substantial street quantities" of illicit drugs. The goal of the classifications, according to the House Report, [H.R. No. 845, supra, at 11], was to allocate scarce law enforcement resources for the war on drugs.

To the degree that limited enforcement resources are wasted pursuing mid-tier

L.S.D. dealers, the statutory aim is frustrated.

Should carrier-weight-based sentencing prevail, those few L.S.D. dealers who continue to market their drugs on heavy paper carriers will remain tempting targets for law enforcement. They are, after all, notoriously easy "marks," (naive, trusting "hippies"), and carrier-weight-based sentencing distorts the magnitude of an L.S.D. "bust" to reflect favorably on the prowess of the arresting officer. Resources will thus be misdirected towards apprehending mid-level dealers while larger-scale dealers in more dangerous compounds may be neglected.

Most L.S.D. dealers will, of course, respond to carrier-weight-based sentencing by changing their marketing technique. But these changes will not be of benefit to Law Enforcement.

For example, sophisticated L.S.D.

dealers might discover that they can dot their L.S.D. on paper with a pipette, and claim that the mixture containing L.S.D. is limited to the area covered by the dot. It is hard to imagine how encouragement of such techniques will seriously diminish trafficking in L.S.D.[43]

Even if "alternative technologies" such as the use of pipettes cannot be brought into the L.S.D. trade, dealers can resort to other tricks. They can simply ship their ware in smaller increments. Or they can cluster L.S.D.-labs closer to the sites at which the drug is applied to paper, thus making for smaller "production runs." Or they can find and use lighter carrier media, (gelatin is already available). All of these eventualities will only make shipments of L.S.D. smaller and harder to detect, and

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[43] The imprecision of pipette application might, moreover, lead to accidental overdoses.

will only frustrate law enforcement efforts.

Although Congress was probably happy that L.S.D. use was declining, there is nothing in the legislative history which suggests that Congress wanted to make further efforts at detection and eradication of the traffic more difficult. Carrier-weight-based sentencing does nothing to discourage the appetite of individual customers for the drug, nor does it make manufacture of the drug (now a bargain at 35 cents a dose [Slip Op. at 42, United States v. Marshall, supra, 908 F.2d. at 1334, Posner, J. dissenting]) more difficult. It only poses some readily soluble logistical hurdles in the distribution chain. Carrier-weight-based sentencing actually frustrates efforts to curtail manufacture, distribution, and consumption of the drug.

(C)

No Rational Basis Has Been,
Or Can Be, Advanced For
Carrier-Weight-Based Sentencing

Of course, Congress need not set out the reasoning underlying its legislative choices, and when a rational result can be inferred, even a statute enacted in ignorance will stand up to Due Process scrutiny. United States Railway Retirement Board v. Fritz 449 U.S. 166, 174 (1981). But when it is clear that no rational reasoning can be advanced, the statute must be deemed to fail the minimum requirements of "rationality" analysis.

At oral argument on appeal, no rational reason for the statute was advanced by the Government. (Slip Op. at 33, fn. 7; United States v. Marshall, supra, 908 F.2d. at 1330, Cummings, J., dissenting). Until the opinion of the Seventh Circuit was filed, the closest the Government and other Courts came to stating a rational basis for the

interpretation was some sort of gut preference for literal readings of statutes. While the wording of a statute is of first and final importance, literalism in statutory construction is neither a constitutionally compelled doctrine nor a rule of public policy. Watt v. Alaska 451 U.S. 259, 266 (1981)."

Apart from a preference for literalism, Marshall is aware of only three purported justifications for construing the "mixture or substance" language in section 841(b) to include carrier media. These rationales, advanced by the Seventh Circuit in its opinion below, are considered in sequence.

First, it has been suggested that Congress may have chosen to penalize blotter paper sales because they have contributed to

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" To the contrary, "[t]he interpretation of the laws is the proper and peculiar provence of the courts." Hamilton, et. al., Federalist (Bourne Ed., 1901) at 101.

the renewed success of L.S.D. (Slip Op. at 21; United States v. Marshall, supra, 908 F.2d at 1325). This assertion simply flies in the face of the legislative history of the act. The only "findings" in the whole legislative history with regard to L.S.D. are (1) that it has not achieved renewed success; and (2) that, on occasion, it is consumed not with blotter paper but with other drugs. One cannot torture out of this a legislative intent to root-out a blotter paper problem which no one had theretofore detected, and the actual decline in L.S.D. use cited by Senator Harkin would have made such intent irrational.

Second, it has been suggested that since most L.S.D. transactions occur on blotter paper, it is not unfair to weigh it. (Slip Op. at 21-22; United States v. Marshall, supra, 908 F.2d at 1324). But transactions on gelatin are common also, as are transactions in pure L.S.D.. That the

plurality of transactions may be on blotter paper,--there is no actual support for this proposition in the record,--merely begs the question and does not answer it. In any event, the "fairness" argument proves too much. Most cocaine transactions are in glassiene envelopes, yet these are not weighed; most drugs are shipped by airplane, yet airplanes are not weighed either.

Finally, it has been suggested that it is too difficult to isolate and weigh L.S.D. accurately, so it is fair to weigh blotter paper. (Slip Op. at 22; United States v. Marshall, supra, 908 F.2d at 1325). At outset, this assertion is untrue; in every published L.S.D. case including this one, the pure L.S.D. has been weighed, and in the instant case it was even separated from its isomers. By contrast, the Government chemist stated that he weighed not only blotter paper but contaminants on it as well,--hardly a model of scientific

precision. In any event, "[t]he constitutional imperatives of the Equal Protection Clause cannot be satisfied by mere conjecture as to administrative inconvenience." Frazier v. Manson 703 F.2d 30, 39 (2 Cir., 1983).

In sum, neither Congress nor any one else has thus far proposed a rational reason for basing sentencing in L.S.D. cases on the weight of the carrier.

(D)

For the Foregoing Reasons, the Carrier-Weight-Based Sentencing Scheme Violates the Equal Protection Component of the Due Process Clause

Congress need not punish similar conduct identically. United States v. Batchelder 442 U.S. 114 (1979). But "[t]he Constitution requires that Congress treat similarly situated persons similarly," [Rostker v. Goldberg 453 U.S. 57, 79 (1981)], and "in the administration of

criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all for like offenses. (sic)." Truax v. Corrigan 257 U.S. 312, 333 (1921).

Thus, while it is Constitutionally permissible to allow prosecutors and courts to select between alternative punishments for like offenses, it is impermissible to set out a single sentencing scheme which imposes mandatory increases or decreases in punishment on the basis of wholly adventitious factors. Should such irrational discrimination occur, prosecutions under the statute are assailable as a violation of Equal Protection. United States v. Batchelder, supra, 442 U.S. at 124-125, 126, fn. 9.

No rational reason which has been or can be advanced in support of a sentencing scheme based on the adventitious weight of the carrier media in L.S.D. cases.

Assuming, for the sake of argument, that Congress did intend the statute to function as it has functioned here, Congress has acted unconstitutionally. The statute must be overturned as violative of the Due Process clause of the Federal Constitution.

III

THE CARRIER-WEIGHT-BASED SCHEME VIOLATES THE DUE PROCESS CLAUSE FOR PROCEDURAL REASONS, AS WELL

The Due Process clause has a procedural as well as a substantive component. Application of carrier-weight-based sentencing to Marshall also offends against this component of the Due Process clause.

Although Congress may establish different punishments for identical conduct, [United States v. Batchelder, supra, 442 U.S. 114], it can only do so only by way of clearly written statutes which give notice to the accused of the range of punishments.

"[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." United States v. Batchelder, supra, 442 U.S. at 123.

Here, the "mixture or substance" language gave no notice to potential offenders as to how they might be penalized.

Marshall committed his crime in mid-1988, when the legislation in question was quite new and had not been given a definitive judicial construction; it will not be definitively construed until a decision is announced in the instant case.[45]

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[45] Marshall's case, United States v. Marshall, supra, 706 F.Supp. 650, was only the second judicial opinion to construe the new "mixture or substance" language, and the previous case, United States v. Bishop 704 F.Supp. 910 (N.D. Iowa, Feb. 7, 1989), was decided only three days before Marshall's trial was held. United States v. McGeehan, supra, 824 F.2d 677 had addressed the issue, but only in dicta.

Concededly, a criminal defendant violates an unconstrued statute at his peril. But persons in Marshall's position received no notice from the statutory language as to how the arbitrary fact that he mounted his L.S.D. on blotter paper instead of on gelatin, for example, would amount to a near-doubling of his sentence.[46] He was thus deprived of notice of the consequences of his criminal act, in violation of the Due Process clause of the Federal Constitution.

IV

CARRIER-WEIGHT-BASED SENTENCING DEPRIVES DEFENDANTS OF A FUNDAMENTAL RIGHT, AND SUCH DEPRIVATION MUST BE ASSESSED UNDER STRICT CONSTITUTIONAL SCRUTINY

Petitioner Chapman argues that

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[46] The "newness" of the Determinate Sentence Law, with its mandatory minimum sentences and its precise sentencing guidelines, provided a context of further subjective uncertainty for criminal defendants.

carrier-weight-based sentencing amounts to an arbitrary deprivation of liberty, and that the deprivation must be scrutinized under the strict standards by which this Court examines claimed impairments of fundamental rights.

Chapman has briefed this issue so extensively that Marshall need not add much to his presentation of the issue.

Inequalities in economic or social welfare regulation are permissible if some rational basis for the inequality has been or can be articulated. United States Railroad Retirement Board v. Fritz, supra, 449 U.S. at 174, fn. 10; Dandridge v. Williams 397 U.S. 471 (1970). Stricter scrutiny has traditionally been afforded for questions involving rights named in or implied from the Constitution. See, discussion in San Antonio Independent School District v. Rodriguez 411 U.S. 1, 33-34 (1973).

Plainly, "liberty" is a fundamental interest guaranteed by the Due Process clause. Imposition of a sentence of imprisonment impinges on this interest.[47]

Despite this, in Marshall v. United States 414 U.S. 417 (1974), this Court declined to extend strict scrutiny analysis to unequal allocation of benefits to Federal Prisoners under a "rationality" standard. Similarly, in McGinnis v. Royster 410 U.S. 263 (1972), this Court reviewed unequal allocation of sentence-reducing "good-time" benefits under a "rationality" standard.

These cases do not, however, stand for the proposition that inequalities in sentencing should be reviewed under a "mere rationality" test. Although both of these cases involved criminal sentencing, they

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[47] It also involves a restriction, over time, of the right to travel from place-to-place which is, itself, fundamental. Shapiro v. Thompson 394 U.S. 618 (1969).

involved denial of benefits, rather than an unequal allocation of sentencing impairments. Benefits are not the same as impairments, so these cases do not directly address the standard by which unequal allocation of punishment should be measured.

Several of this Court's cases suggest that unequal allocation of detriment might be reviewed under a more exacting standard. In Skinner v. Oklahoma 316 U.S. 535 (1941), this Court used "strict scrutiny" analysis to strike down a forced vasectomy statute which discriminated arbitrarily amongst prisoners. This Court justified its analysis on grounds that childbearing was a fundamental right, notwithstanding its refusal to recognize such a right a few years earlier in Buck v. Bell 274 U.S. 200 (1927). Similarly, in Williams v. Illinois 399 U.S. 235 (1970), this Court invalidated a sentencing-discrimination based on wealth notwithstanding that wealth is not, itself,

a suspect classification under the Constitution, [San Antonio Independent School District v. Rodriguez, supra, 411 U.S. 1].

Of course, a decision by the legislature to criminalize given misconduct will provide compelling enough reason to warrant a restriction on liberty, even if severe. But "[t]he safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." Mullaney v. Wilbur 421 U.S. 684, 698 (1975). Wilbur invalidated a Maine procedural hurdle which tended to favor the state in proving that a homicide was murder as opposed to manslaughter, thus increasing the potential sentence faced by the accused. While the standard of review in Wilbur was not spelled-out, it would appear that this Court strictly considered

the impairment claimed by Wilbur as against any justification for the procedure in state law.

Sentencing is as "critical [a] stage," [Mempa v. Rhay 389 U.S. 128, 134 (1967)], of a criminal case as is the trial, itself; in the instant case, the entire conflict of the parties was over the length of Marshall's sentence. In resolving this conflict, Marshall was entitled to receive strict judicial scrutiny of a scheme which increased the length of his sentence from five to twenty years as a result of a fortuity.

Marshall believes he can prevail in this case even under a "mere rationality" standard. But if for some reason he cannot, he respectfully requests that this Court review strictly a scheme which has taken so large a portion of his life for so gossamer a reason.

V

BASING SENTENCE LENGTH MOSTLY ON CONDUCT UNRELATED TO ACTUAL CULPABILITY VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS

(A)

This Court Should Consider This Contention Even Though Chapman Did Not Pose It

This Court understandably "disapprove[s] of the practice of smuggling additional questions into a case after we grant certiorari." Irvine v. California 347 U.S. 128, 129 (1954).

However, Marshall raised an Eighth Amendment claim below, and again in his petition for a writ of certiorari.[**] See,

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[**] See, Appellant's Opening Brief at 19: "As we previously pointed out, had defendant been sentenced on the basis of the weight of the drug, he would have received a sentence of 41 to 51 months. However, defendants sentence is roughly two hundred months more because of the inclusion of the weight of the paper. This 230% increase is totally disproportionate to the offense committed and in clear violation of (continued...)

e.g., Peters v. Kiff 407 U.S. 493, 495 (1972). The certiorari petition is still pending as a result of unusual procedural accidents in this case.

Marshall believes that his Eighth Amendment claim has potential merit and might be useful to this Court in consideration of this case. The Eighth Amendment analysis tends to merge with Due Process claims already advanced.

With deference to the traditions of this Court, Marshall respectfully requests that this Court, should it choose to do so, consider the below-stated claim.

"(...continued)
defendant's Eighth Amendment rights. There is simply no penalogical justification for such a sentence ...." The claim was briefed by the Government in its brief at pages 14-16. Appellant replied at page 6 of his reply brief. The Court considered the claim, albeit cursorily. (Slip Op. at 12; United States v. Marshall, supra, 908 F.2d at 13). Marshall raised it again in his certiorari petition at pages 51-58.

(B)

Basing Sentence Length on Conduct Not Proportionate To the Gravity of an Offense Violates the Prohibition Against Cruel and Unusual Punishments

The carrier-weight-based sentencing scheme also fails under the Eighth Amendment to the Constitution.

The Seventh Circuit pointed out that longer sentences for lesser offenses have been held not to violate the Eighth Amendment. Hutto v. Davis 414 U.S. 370 (1982). For that matter, a twenty year sentence for L.S.D. dealing,--albeit in excess of the 300,000 dose range,--has been upheld against an Eighth Amendment challenge. United States v. Wylie 625 F.2d 1371 (9 Cir., 1980).

But the absolute length of a sentence is but one factor to be considered in Eighth Amendment jurisprudence. The true test is whether a sentence, however long, is

"proportionate" to the crime. Solem v. Helm 463 U.S. 277, 290-292 (1983). Helm went on to hold that ingredients of proportionality include the harm suffered by the victim and the culpability of the accused. Solem v. Helm, supra, 463 U.S. at 292.

Here, Congress determined that cocaine and heroin dealers trafficking at Marshall's level ought generally to receive sentences of far less duration than that received by Marshall. This sheer disparity is strong evidence of disproportionality, but it is not the only or even the most telling factor.

Perhaps more significant is that punishment here was increased on the basis of an adventitious factor which did not aggravate either the crime or Marshall's culpability in committing it. This is a significant contaminant of the sentencing process, which, when extreme, renders a sentence disproportionate within the meaning

of the Eighth Amendment.

Here, the adventitious non-criminal factor makes up almost the whole length of the sentence. The punishment is excessive indeed.

Use by Marshall of blotter paper was so unrelated to the gravity of the offense as to provide an impermissible basis for increased punishment.[49] Although his L.S.D. was sold with blotter paper, the blotter paper was so unrelated to the actual harm implicit in drug sales that its dominant status as a sentencing-determinate is unconscionable. No one who purchased Marshall's L.S.D. was harmed to a greater

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[49] Under 21 U.S.C. 881(a)(3), material possessed as a container for controlled substances is subject to civil forfeiture, but the statute makes no provision for imprisonment of persons possessing blotter paper.

After Marshall's trial, Congress enacted a civil forfeiture provision more focused on carrier media. 21 U.S.C. 881(a)(9). Again, however, this statute does not provide for increased punishment.

degree because the drug was mounted on paper instead of a gel, or because the paper he used weighed twice as much as Chapman's.[50]

Marshall's contention, although novel, is bolstered by the holding in United States v. Busher 817 F.2d 1409 (9 Cir., 1987). At issue there was a provision of the anti-racketeering statute, (R.I.C.O.), 18 U.S.C. 1963(a), which provided for civil forfeiture of all property involved in a tainted enterprise. Busher, whose enterprise was "essentially legitimate, [and who committed] ... relatively minor R.I.C.O. violations," [United States v. Busher, supra, 817 F.2d at 1415], contended that forfeiture of his entire interest was disproportionate to his

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[50] In this, Marshall's case must be distinguished from those in which punishment is permissibly increased on the basis of factors that, while collateral, are not adventitious. For example, had Marshall diluted his L.S.D. to increase its volume or had he trafficked in a schoolyard, punishment might legitimately be increased. But he did nothing like this to warrant greater punishment.

offense, and the Court of Appeals agreed. It remanded the case for a determination of what portion of Busher's enterprise should be subject to forfeiture.[51]

Over one hundred years prior to Busher, a similar result was reached in United States v. Certain Piece of Land 25 Fed. Cses. 366 (D.Cal., 1870). There, pursuant to a forfeiture statute, the Government sought to confiscate an entire farm, upon a corner of which had been erected an illegal distillery. The Court held that "literal application of [the statutory] language would not only be harsh but unequal,--for it would make the amount of the forfeiture

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[51] Marshall is aware that in United States v. Tax Lot 1500, T.P. 38 So., Range 2 E. 861 F.2d 232 (9 Cir., 1989), the Court of Appeals differentiated between "disproportionate" civil forfeitures and disproportionate criminal forfeitures. The distinction does not matter here. As did Busher, Marshall is challenging a punishment imposed as part of an "in personam" proceeding against him. See, United States v. Busher, supra, 817 F.2d at 1417.

depend not on the value of the distillery, ... but upon the accidental circumstances that the illicit distiller happened to own a large tract, on the corner of which a still ... was erected."

In Robinson v. California 370 U.S. 660 (1962), this Court held that punishment cannot constitutionally be inflicted on the basis of "status" violations. In Weems v. United States 217 U.S. 349 (1909), this Court condemned a series of accessory-punishments including lifelong surveillance and "civil interdiction" for the crime of making false entries in a financial record. Apart from being barbarous, the punishment was disproportionate to the gravity of the offense and to the state-of-mind underlying its commission. Neither Weems nor Robinson directly hold that punishment based on adventitious factors is violative of the Eighth Amendment, but both suggest it.

Here, seventy-five percent of

Marshall's punishment was based on the wholly adventitious factor of the weight of his paper. His sentence is clearly disproportionate under the Eighth Amendment to the Constitution.

CONCLUSION

The Court of Appeals condoned, somewhat glibly, that prosecutors had "the power to excuse the big cheeses while landing on the small fry with hobnail boots." (Slip Op. at 14; United States v. Marshall, supra, 908 F.2d at 1321). Such cynicism would be intolerable under a rational interpretation of the comprehensive anti-drug statutes or under a fully-developed Constitutional jurisprudence. Marshall is a "small fry" who got a wildly disproportionate sentence on the basis of an irrational adventitious factor.

All of the judges on the Seventh Circuit Court of Appeal appear to have

viewed the carrier-weight-based sentencing scheme as "odd," (Slip Op. at 3; United States v. Marshall, supra, 908 F.2d at 1315), and "harsh." (Slip Op. at 24; United States v. Marshall, supra, 908 F.2d at 1325). Judge Posner characterized the sentences at issue here as "exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment. . .implied from the words (taken one by one) of the relevant enactments." (Slip Op. at 43; United States v. Marshall, supra, 908 F.2d at 1335).

But the words of the enactment are not plain. They have multiple referents, and different Courts have construed them differently. In any event, "[o]ne of the surest indexes of a mature and developed jurisprudence is not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object

to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning." Cabell v. Markham 148 F.2d 737, 739 (2 Cir., 1945, L. Hand, Judge), *aff'd* 326 U.S. 404.

It is clear that Congress did not mean to punish L.S.D. dealers on the fortuity of the weight of the carrier media on which they mount the drug. If Congress did mean to do so, they have run afoul of the Fifth and Eighth Amendments to the Constitution.

This case is about a few poorly chosen words which have cost Marshall fifteen years of his life. This is a great injustice which this Court should rectify.

The judgment of the Seventh Circuit should be reversed.

DATED: January 22, 1991

Respectfully Submitted,

DONALD THOMAS BERGERSON
Attorney for Respondent
Stanley Marshall

Supreme Court, U.S.
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No. 90-5744

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD L. CHAPMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether, in determining the weight of LSD for sentencing purposes, the district court correctly considered the combined weight of the LSD and the blotter paper used as a carrier medium for the drug.

2. Whether the Constitution bars Congress or the Sentencing Commission from requiring courts, in sentencing defendants for LSD offenses, to consider the combined weight of the LSD and the blotter paper that is used as a carrier medium for the drug.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-5744

RICHARD L. CHAPMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 38-87) is reported at 908 F.2d 1312. The opinion of the district court (J.A. 13-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1990. J.A. 88-89. The petition for a writ of certiorari was filed on September 17, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Pertinent constitutional, statutory, and Sentencing Guidelines provisions are reprinted in Appendix A to this brief.

STATEMENT

Following a joint jury trial in the United States District Court for the Western District of Wisconsin, petitioners were convicted of distributing lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841(a)(1). Petitioner Chapman was sentenced to 96 months' imprisonment; Schoenecker was sentenced to 63 months' imprisonment; and Brumm was sentenced to 60 months' imprisonment. J.A. 20, 26, 32. The en banc court of appeals consolidated their case with that of respondent Marshall. Marshall was convicted of distributing ten or more grams of a mixture or substance containing a detectable amount of LSD, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to 240 months' imprisonment.[1] The en banc court of appeals affirmed the judgment in both cases.

1. LSD is a hallucinogenic or psychedelic drug. When the effects of LSD were discovered in 1943, scientists believed that the drug might help them understand mental illness, but it soon became evident that the dangers of the drug far outweighed any scientific value it might have, and LSD was universally outlawed.

LSD is an extremely powerful drug. It is more than 100 times as potent as psilocybin and psilocin, other hallucinogenic drugs, and from 4,000 to 10,000

[1] Marshall was convicted of distributing 11,751 doses of LSD. Marshall has filed a separate certiorari petition (No. 90-929) seeking review of the judgment below, but he is also a respondent in this case, pursuant to this Court's Rule 12.4, and he has filed a separate brief as respondent supporting petitioners. For the sake of clarity and convenience, we will use the terms "Chapman" and "Marshall" to refer to the two cases and the two briefs.

times as potent as mescaline, a naturally occurring substance with hallucinogenic properties. LSD is also highly dangerous. Under some conditions, LSD can induce confusion, disorientation, illusions, hallucinations, delusions, paranoid ideations, and other alterations of mood and thinking.[2] Today, LSD has no legitimate medical use, and it is listed under the federal drug laws as a Schedule I Controlled Substance. 21 U.S.C. 812. See Tr. 66-67.[3]

LSD is bought and sold by the dose, not by its weight.[4] Tr. 30. According to the Sentencing Commission, the average dose of LSD is 0.05 milligrams, which means that a gram of the pure drug can produce 20,000 doses. United States Sentencing Comm'n, *Guidelines Manual* 2.53 (1990). Since a single dose of LSD is almost infinitesimal, the drug is typically distributed through a carrier medium, such as perforated "blotter" paper or gelatin. The LSD is dissolved in a solvent, such as alcohol or water, and it is then sprayed or dropped with a pipette onto the paper or gelatin; alternatively, the blotter paper is dipped

[2] Those effects sometimes manifest themselves in psychotic states, bizarre or violent behavior, or attempts at suicide. In most cases the psychosis clears within hours or days, but in some cases it can persist for months. T. Cox *et al., Drugs and Drug Abuse: A Reference Text* 86-89, 95-97, 307-315 (1983); A. Goodman *et al., Goodman and Gilman's The Pharmacological Basis of Therapeutics* 562-565 (7th ed. 1985); A. Hoffmann, *LSD: My Problem Child* 45, 67-70 (1983).

[3] "Tr." refers to the trial transcript in the case of respondent Marshall. That record was before the court of appeals, because the court consolidated Marshall's case with Chapman's.

[4] In forensic chemistry, the term "dose" or "dosage unit" refers to a tablet, a capsule, or a piece of paper that is used to distribute a drug. Tr. 40.

into the solution. After the solvent evaporates, the blotter paper or gelatin can be sold as a unit or cut into small one-dose squares. Users can swallow the entire square; they can drop it into a beverage that releases the drug; or they can lick the LSD off the paper. J.A. 39-40; Tr. 8-10, 30-35, 38-40, 48-50, 68-69.[5]

2. On April 17, 1989, undercover police officer Dan Roman of the Madison, Wisconsin, Police Department spoke with petitioner Chapman over the telephone to discuss the purchase of LSD. Chapman told Officer Roman that he could supply 20 sheets or approximately 2,000 doses of LSD, but that his source was out of town. Chapman and the officers agreed to meet at a local bar two nights later in order to complete the sale. When they met that evening, Chapman told Officer Roman that he could supply the officer only 1,000 doses of LSD and that the price would be $1,750. Chapman and Roman agreed to make the exchange one hour later. Chapman then left the bar and met with petitioners Schoenecker and Brumm. Schoenecker later accompanied Chapman to the bar, where Chapman sold the LSD to Officer Roman. The

[5] For other descriptions of how LSD is prepared, distributed, and ingested, see *United States* v. *Larsen*, 904 F.2d 562, 563 (10th Cir. 1990), petition for cert. pending, No. 90-5509; *United States* v. *Elrod*, 898 F.2d 60, 61 (6th Cir.), cert. denied, 111 S. Ct. 104 (1990); *United States* v. *Bishop*, 894 F.2d 981, 985-987 (8th Cir. 1990), aff'g 704 F. Supp. 910, 911 (N.D. Iowa 1989); *United States* v. *Daly*, 883 F.2d 313, 317-318 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); *United States* v. *Rose*, 881 F.2d 386, 388 (7th Cir. 1989); *United States* v. *Healy*, 729 F. Supp. 140, 141 (D.D.C. 1990), appeal pending (D.C. Cir.); *United States* v. *Marshall*, 706 F. Supp. 650, 651-652 (C.D. Ill. 1989), aff'd, 908 F.2d 1312 (7th Cir. 1990) (en banc) (decision below), cert. granted *sub nom. Chapman* v. *United States*, No. 90-5744.

defendants were arrested minutes later. At the time of their arrests, Schoenecker and Brumm had with them the pre-recorded bills that Officer Roman had used to purchase the LSD. J.A. 4-8.

3. Chapman, Schoenecker, and Brumm were charged with distributing approximately five grams of LSD, in violation of 21 U.S.C. 841(a)(1). J.A. 9. All three pleaded guilty. With respect to sentencing, they argued that under the statute and the Sentencing Guidelines their sentences should be calculated on the basis of the weight of the LSD alone, without including the weight of the blotter paper that was used as a carrier medium for the drug.

The district court rejected their argument. The court noted that both the Sentencing Guidelines and the statute set the penalties for LSD offenses according to the weight of any "mixture or substance containing a detectable amount" of LSD. See 21 U.S.C. 841(b)(1)(B); Sentencing Guidelines § 2D1.1, Drug Quantity Table n.*. The court concluded that the LSD-infused blotter paper that Chapman sold to Officer Roman was a "mixture or substance" containing the LSD. Therefore, the court held, the 5.7 gram weight of the blotter paper and the drug should be used as the basis for sentencing, rather than the weight of the pure drug, which the government stipulated was less than one gram. See J.A. 8, 12, 13. Because the LSD-infused blotter paper weighed more than one gram, the court held that 21 U.S.C. 841(b)(1)(B)(v) required that the defendants be sentenced to at least five years' imprisonment. And because the drug-infused blotter paper weighed more than four but less than seven grams, the court held that petitioners' base offense level under the Sentencing Guidelines was 28. J.A. 13-17. See Guidelines § 2D1.1, Drug Quantity Table.

The district court held that Congress and the Sentencing Commission had not acted irrationally in setting the penalties for LSD offenses on the basis of the combined weight of the carrier medium and the drug. J.A. 15-16. "Presumably," the court wrote, Congress "wanted to impose heavy penalties on the transportable form of the drug, since it was in that form that [LSD] posed the greatest danger. It was not irrational for Congress to make that choice or, having made it, to decline to provide separate penalties for every possible medium in which the drug might be distributed." J.A. 16. The court also rejected the defendants' argument that LSD should be treated differently from other drugs because of the way that LSD is distributed. Cocaine, the court explained, is rarely sold in pure form; it is frequently mixed with some cutting agent. Yet "[u]nder both the statute and the sentencing guidelines, persons who sell 500 grams of heavily cut cocaine can be subjected to the same penalties as persons who sell 500 grams of pure cocaine." *Ibid.*

The government moved pursuant to Sentencing Guidelines § 5K1.1 for a downward departure below the indicated Guidelines range because the defendants had provided substantial cooperation in the government's investigation. The government declined, however, to file a motion under 18 U.S.C. 3553(e), which would have allowed the court to reduce the defendants' sentences below the mandatory minimum five-year sentence set by 21 U.S.C. 841(b)(1)(B)(v). The court then sentenced petitioners to terms of imprisonment that were below the Sentencing Guidelines range, but at or above the statutory mandatory minimum.

4. A divided court of appeals, sitting en banc, affirmed petitioners' sentences. J.A. 38-87. The court

noted that both the federal drug statutes and the Sentencing Guidelines provide an escalating range of punishments for drug offenses based on the weight of any "mixture or substance containing a detectable amount" of a controlled substance. In light of that language, the court found that "[i]t is not possible to construe the words of § 841 to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug." J.A. 43. Thus, in accord with the conclusion reached by other courts of appeals, the court held that an LSD carrier medium, such as blotter paper, constitutes a "mixture or substance containing a detectable amount" of the drug and must be included in calculating the drug's weight. J.A. 44-48.

The court of appeals also concluded that this scheme was rational, and therefore constitutional, for several reasons. J.A. 50-62. First, the court noted that the use of blotter paper makes LSD easier to transport, conceal, and sell. The paper therefore plays an important role in facilitating the distribution of the drug. Second, the court held that because blotter paper was the carrier medium used in virtually all cases involving LSD, it was rational for the statutes and the Sentencing Guidelines to address "the main cases rather than the exceptions." J.A. 60. Third, the court concluded that it was reasonable for Congress to include the weight of the blotter paper in calculating the weight of the drug, since it would be costly and technologically difficult to extract and accurately weigh the amount of LSD contained in the blotter paper. *Ibid.* Finally, the court noted, petitioners selected the lightest and most common carrier medium available for distributing their LSD; they were therefore "in no position to complain" that the

statute or the Sentencing Guidelines were unconstitutional as applied to them. J.A. 61.

Five judges dissented. They concluded that Congress did not intend that LSD carrier mediums, such as blotter paper, should be considered a "mixture or substance" for purposes of determining the weight of LSD for sentencing purposes. Even if Congress intended the weight of the carrier medium to be included in calculating the weight of the LSD, however, the dissenters believed that such a sentencing scheme would offend due process principles because, in their view, it is irrational to make the difference in a defendant's sentence turn on the weight of an inert ingredient. J.A. 63-72 (Cummings, J., dissenting); *id.* at 73-87 (Posner, J., dissenting).

SUMMARY OF ARGUMENT

The courts below correctly held that the sentence for distributing LSD rests on the gross weight of the drug and its carrier medium, not on the net weight of the pure drug, and that a weight-based sentencing scheme for LSD offenses is not irrational.

1. The Anti-Drug Abuse Act of 1986 and the Sentencing Guidelines created a set of graduated penalties that vary according to the weight of the "mixture or substance containing a detectable amount of" LSD, not according to the weight of the pure drug. Congress and the Sentencing Commission adopted a weight-based penalty system in order to punish severely offenders who distribute large quantities of drugs, regardless of their purity. The Act and the Guidelines include LSD within that penalty scheme, and there is no reason to fashion a special exception for LSD that is not found in the text of either the statute or the Guidelines.

LSD-infused blotter paper is a "mixture or substance containing a detectable amount of" the drug, because LSD binds itself to the paper in the application process (and therefore "mixes" with the paper) or because the paper is designed to be ingested along with the drug (and therefore is a "substance" containing LSD). The role of blotter paper in the distribution of LSD does not differ materially from the role played by carriers in the distribution chain in the case of other drugs. Because a dose of LSD is infinitesimal, some carrier is necessary for LSD to be distributed. Blotter paper serves that role: It allows LSD to be sold in an easily concealable, transferable, and ingestible form.

2. The penalty scheme established by the Anti-Drug Abuse Act of 1986 is not unconstitutional. That scheme does not infringe a defendant's "fundamental right to liberty," since a lawfully convicted defendant may be sentenced to any punishment defined by law that is not cruel and unusual. The penalty scheme can be challenged only on the ground that it is irrational, and this one is not.

Congress acted rationally in requiring the courts to include the weight of LSD-infused blotter paper when calculating a defendant's sentence for distributing LSD. The weight of the carrier serves as a rough proxy for the size of the trafficker's criminal enterprise. Moreover, any claim that a defendant's sentence does not correspond to the particular facts of his case could also be lodged against a fixed sentence for distributing LSD, but determinate sentences are clearly constitutional. Finally, the Act and the Sentencing Guidelines allow the courts room to adjust a sentence upward or downward in order to reflect the role a defendant played in the distribution scheme.

Including the weight of an LSD carrier does not render the 1986 Act unconstitutionally vague. The text of the statute gave the defendants fair warning that the weight of the carrier would be counted. It is not necessary that a statute be "definitively construed" in order for it to overcome a claim of unconstitutional vagueness; all that is required is that the defendants have fair notice of how the statute may be read.

ARGUMENT

I. THE ANTI-DRUG ABUSE ACT OF 1986 AND THE SENTENCING GUIDELINES REQUIRE THAT THE COMBINED WEIGHT OF THE LSD AND ITS CARRIER MEDIUM BE USED IN CALCULATING THE TOTAL WEIGHT OF THE DRUG FOR SENTENCING PURPOSES

Trafficking in LSD is prohibited by the federal drug laws, 21 U.S.C. 812 and 841(a), and is severely punished. Distribution of less than one gram of LSD is punishable by up to 20 years' imprisonment, 21 U.S.C. 841(b)(1)(C); trafficking in greater amounts brings even stiffer penalties. A first offender who distributes one gram or more of a "mixture or substance containing a detectable amount of" LSD must be sentenced to a five-year term of imprisonment and may be incarcerated for up to 40 years. 21 U.S.C. 841(b)(1)(B)(v). A first offender who distributes ten or more grams must receive a sentence of ten years' imprisonment and may be confined for life. 21 U.S.C. 841(b)(1)(A)(v).

The question in this case involves the appropriate method for calculating a defendant's sentence under Section 841(b)(1) for an LSD violation. The district court based its sentence calculation on the weight of both the pure LSD and the blotter paper that

served as a carrier medium for the drug. The defendants maintain that Congress and the Sentencing Commission did not intend the weight of an LSD carrier to be used in calculating the weight of the drug for sentencing purposes. That is so, they contend, even though a carrier medium such as blotter paper is ordinarily used to distribute LSD, and even though that carrier medium can be and ordinarily is ingested along with the drug.

Six courts of appeals have considered the defendant's argument, and every one has rejected it. See *United States* v. *Larsen*, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509; *United States* v. *Elrod*, 893 F.2d 60 (6th Cir.), cert. denied, 111 S. Ct. 104 (1990); *United States* v. *Bishop*, 894 F.2d 981, 985-987 (8th Cir. 1990); *United States* v. *Daly*, 883 F.2d 313, 316-318 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); *United States* v. *Rose*, 881 F.2d 386 (7th Cir. 1989); *United States* v. *Taylor*, 868 F.2d 125, 127-128 (5th Cir. 1989).[6] Those courts have determined that the defendants' argument is inconsistent with the text and purpose of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, and with the Sentencing Guidelines. For the reasons given below, those courts are correct.

A. Sentences For LSD Offenses Are Based On The Gross Weight Of The Drug And Its Carrier Medium, Not The Net Weight Of The Pure Drug

1. The graduated set of penalties for LSD offenses found in the Anti-Drug Abuse Act of 1986 makes the defendant's sentence turn on the weight of the "mix-

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[6] One district court has ruled to the contrary. *United States* v. *Healy*, 729 F. Supp. 140 (D.D.C. 1990). The government has taken an appeal from that ruling.

ture or substance containing a detectable amount" of LSD that a person distributes, not the weight of the pure drug. Thus, the statute makes it quite clear that if the drug and the carrier medium together can be considered a "mixture or substance," it is the gross weight of the drug and the carrier medium that determines the applicable penalty, not the weight of the pure drug that may be contained in the carrier medium.

Other provisions of the 1986 Act make clear that Congress knew how to distinguish between the weight of a pure drug and the weight of a "mixture or substance" containing some quantity of the drug, and that the reference to "mixture or substance" was not simply a careless way of referring to the amount of the pure drug distributed. With respect to both phencyclidine (PCP) and methamphetamine, the Act in several places imposes penalties based either on an amount of the pure drug or a larger amount of a "mixture or substance" containing the drug. See 21 U.S.C. 841(b)(1)(A)(iv), (B)(iv), (B)(viii). PCP and methamphetamine are the only drugs for which the Act provides a penalty gauged according to the weight of the pure drug. The reference to the pure weight of those drugs, and the use of a larger amount of the "mixture or substance" containing those drugs as an alternative basis for sentencing for PCP and methamphetamine crimes, both indicate that where Congress referred to the weight of a "mixture or substance" containing a drug, it meant to trigger the statutory penalty scheme by reference to the combined weight of the drug and its carrier medium.

2. The genesis of the "mixture or substance" clause in the Anti-Drug Abuse Act of 1986 reinforces the plain meaning of the text. The Comprehensive

Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Tit. II, 84 Stat. 1260-1261, established penalties for the distribution of controlled substances according to the type of drug involved, not its weight. The distribution of Schedule I or II controlled substances carried a heavier punishment than the distribution of other drugs. See 21 U.S.C. 841(b)(1)-(3) (1982); H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 4-5, 10-11, 46-51 (1970); S. Rep. No. 613, 91st Cong., 1st Sess. 24-26 (1969). The distribution of LSD, a Schedule I controlled substance, was punishable by a maximum of five years' confinement. 21 U.S.C. 841(b)(1)(B) (1982).

The Controlled Substances Penalties Amendments Act of 1984, enacted as Chapter V of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2068, modified the penalty system by introducing the principle that the sentence should vary according to the weight of the controlled substance that is chargeable to the defendant. In the case of LSD, the 1984 Act imposed a maximum term of 20 years' imprisonment for the distribution of five or more grams of LSD. 21 U.S.C. 841(b)(1)(A)(iv) (Supp. II 1984). Distribution of lesser amounts of LSD were subject to a maximum term of 15 years' imprisonment. 21 U.S.C. 841(b)(1)(B) (Supp. II 1984). See S. Rep. No. 225, 98th Cong., 1st Sess. 255-259 (1983). In each case, however, the relevant weight was that of pure LSD. *United States* v. *McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

Congress again modified the penalty system for controlled substances in the Narcotics Penalties and Enforcement Act of 1986, Title I of the Anti-Drug Abuse Act of 1986. That Act adopted a so-called "market-oriented approach" to punishing drug traf-

ficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. 1, at 11-12, 17 (1986). To implement that principle, Congress created terms of imprisonment and set mandatory minimum sentences to correspond to the weight of a "mixture or substance containing a detectable amount of" the various Schedule I and II controlled substances, including LSD. 21 U.S.C. 841(b)(1)(A)(i)-(viii) and (B)(i)-(viii).

Chapman maintains that the legislative history of the Anti-Drug Abuse Act of 1986 shows that Congress did not intend to include the weight of the LSD-infused carrier medium. Chapman Br. 21-25. But Chapman does not point to anything in the legislative history of that Act to support that claim. Instead, he relies on a passage in a 1981 Senate Report on a bill that Congress did not enact into law, the proposed Criminal Code Reform Act of 1981 (S. 1630). In that report, the Senate Judiciary Committee proposed amending the federal drug laws to base the penalty for LSD trafficking on the weight of the pure drug. In so doing, the Committee noted that five grams of LSD is "approximately 100,000 times the average user dosage." S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981). That estimate is correct, Chapman argues, only if the weight of LSD carriers is not counted. Chapman Br. 23. Chapman therefore maintains that Congress must have assumed that the mandatory minimum sentencing provisions of the 1986 Act would not be triggered by "low level dealers" like himself. Chapman Br. 24.

That argument is unpersuasive. The cited passage came in the midst of a discussion about amending the penalty scheme in the 1970 Act in order to correlate

the penalty with the amount of pure drug distributed. S. Rep. No. 307, *supra*, at 867-869. Congress adopted a "pure drug" sentencing scheme when it subsequently enacted the Controlled Substances Penalties Amendments Act of 1984. See 21 U.S.C 841(b)(1)(Supp. II 1984); S. Rep. No. 225, *supra*, at 255-259. But the Anti-Drug Abuse Act of 1986 rejected the principle that a defendant's punishment should be gauged by the quantity of the pure drug involved. Since the 1986 Act modified the 1984 statute to make a "mixture or substance containing a detectable amount of" LSD the relevant quantity, there is no reason to assume that Congress continued to believe that sentences for LSD offenses should be graduated according to the amount of pure LSD sold, as had been the case under the 1984 statute.[7]

3. In formulating the scheme for sentencing LSD offenders, the Sentencing Commission followed Congress's lead and graduated sentences according to the weight of the "mixture or substance" containing the controlled substance, rather than the actual weight of the controlled substance itself. The Commission devised a Drug Quantity Table to set the offense levels for different quantities of drugs. See Guidelines § 2D1.1(c). That Table incorporates the "mixture or substance" formulation from the Anti-Drug Abuse Act of 1986 to calculate the weight of a drug for the various base offense levels under that Table. See United States Sentencing Comm'n, *Guidelines*

[7] Chapman cites *United States* v. *McGeehan*, 824 F.2d at 681, to support his argument, Chapman Br. 25, but that case involved the 1984 statute, not the 1986 Act. In *United States* v. *Bishop*, 894 F.2d at 985-987, the Eighth Circuit rejected Chapman's submission.

Manual 2.47 n.* (1990).[8] See also *id.* at 2.48, Application Note 1 ("'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841."); *id.* at 2.49, Application Note 10 ("The Commission has used the sentences provided in, and the equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences."); *id.* at 2.53 (distinguishing between "the weight of the actual controlled substance, and * * * the weight of the mixture or substance containing the controlled substance").

The Sentencing Guidelines also contain a Conversion Table for use in determining the defendant's

[8] The footnote accompanying the Drug Quantity Table in Sentencing Guidelines § 2D1.1 states:

> Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined for the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater.

Guidelines Manual Drug Quantity Table 2.47 n.*.

The version of this footnote in the original *Guidelines Manual* § 2D1.1(a)(3) Drug Quantity Table 2.39 n.* (1987) referred to a "mixture *of* a compound" (emphasis added), not a "mixture *or* a compound." The use of the term "of" in the original *Guidelines Manual* was obviously a typographical error, since the Commission used the phrase "mixture *or* compound" in the following clause of the same footnote (emphasis added), and since the Anti-Drug Abuse Act, on which that Sentencing Guideline provision is modeled, is framed in the disjunctive. The 1990 version of the Guidelines has corrected the error.

base offense level in cases where the number of doses, but not the weight of a drug, is known. The Sentencing Commission specifically noted that, in connection with LSD, "the weight per unit shown is the weight of the actual controlled substance, *and not generally the weight of the mixture or substance containing the controlled substance.* Therefore, use of this table provides a very conversative estimate of the total weight." *Id.* at 2.53 (emphasis added). See App., *infra*, 2a. As the court below recognized, J.A. 48-49, that Table shows that the Sentencing Commission believes that the known weight of an LSD carrier must be included as part of the weight of the "mixture or substance" under the Act and the Guidelines.

Accordingly, it is beyond serious dispute that both Congress and the Sentencing Commission have required that courts fashion sentences for LSD offenders based on the weight of the drug and the carrier medium involved, rather than the weight of the pure drug itself. In light of the statutory language and the corresponding approach employed in the Sentencing Guidelines, it is not surprising that the courts of appeals have consistently rejected the argument that a sentence should rest on the net weight of the pure controlled substance, as Chapman and Marshall suggest.[9]

[9] *E.g., United States* v. *Dorsey*, Nos. 90-1214 *et al.* (8th Cir. Dec. 24, 1990), slip op. 6-9 & n.5 (PCP); *United States* v. *Touby*, 909 F.2d 759, 772-773 (3d Cir. 1990) (4-methylaminorex ("Euphoria")), cert. granted, No. 90-6282; *United States* v. *McKeever*, 906 F.2d 129, 133 (5th Cir. 1990) (phenylacetone), cert. denied, No. 90-5917 (Jan. 22, 1991); *United States* v. *Mueller*, 902 F.2d 336, 345 (5th Cir. 1990) (methamphetamine); *United States* v. *Skelton*, 901 F.2d 1204 (4th Cir. 1990) (PCPy, an analog of PCP); *United States* v. *Meitinger*, 901 F.2d 27, 29 (4th Cir.) (dilaudid), cert. denied, 111 S. Ct. 519

B. LSD-infused Blotter Paper Constitutes "A Mixture Or Substance Containing A Detectable Amount" Of LSD

Neither the 1986 Act nor the Sentencing Guidelines define the terms "mixture" and "substance." Absent some clear indication to the contrary, those terms therefore must be given their ordinary meaning. See *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990); *Russello* v *United States*, 464 U.S. 16, 21 (1983). A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence," while a "substance" includes "a distinguishable kind of physical matter." *Webster's Third New International Dictionary* 1449, 2279 (1986). Those definitions are clearly broad enough to include LSD-infused blotter paper as a "mixture or substance containing a detectable amount of" LSD.

LSD is applied to blotter paper in a solvent, such as alcohol, which is absorbed into the paper and ultimately evaporates. When the solvent evaporates, the LSD is left behind in a form that can be said to

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(1990); *United States* v. *Elrod*, 898 F.2d at 62-63 (LSD); *United States* v. *Bayerle*, 898 F.2d 28 (4th Cir.) (dilaudid and dolaphine (methadone)), cert. denied, 111 S. Ct. 65 (1990); *United States* v. *Butler*, 895 F.2d 1016 (5th Cir. 1989) (statute and Sentencing Guidelines required a sentence based on total weight of 38½-pound mixture that contained only small amount of methamphetamine), cert. denied, 111 S. Ct. 82 (1990); *United States* v. *Bishop*, 894 F.2d at 985-986 (LSD); *United States* v. *Baker*, 883 F.2d 13, 15 (5th Cir.) (methamphetamine), cert. denied, 110 S. Ct. 517 (1989); *United States* v. *Rojas*, 868 F.2d 1409, 1409-1410 (5th Cir. 1989) (cocaine).

"mix" with the paper. J.A. 44-45; Tr. 48. Alternatively, LSD-infused blotter paper can be viewed as a "substance" that "contain[s]" the LSD, since the entire unit in effect constitutes a form of LSD that is convenient to distribute and ingest. *United States* v. *Daly*, 883 F.2d at 317; *United States* v. *Bishop*, 704 F. Supp. at 911. Accordingly, whether the LSD-infused blotter paper is viewed as a "mixture," as the Seventh Circuit concluded, J.A. 44-45, or a "substance," as the Fourth and Eighth Circuits held, *United States* v. *Bishop*, 894 F.2d at 986; *United States* v. *Daly*, 883 F.2d at 317, the entire unit is a "mixture or substance containing a detectable amount" of LSD within the meaning of the statute and the Sentencing Guidelines, and the weight of the carrier medium must therefore be added to the weight of the pure drug to determine the appropriate penalty.

Chapman argues (Br. 16-17) that it is wrong to treat blotter paper as a "cutting agent," because the paper does not increase the number of doses that can be distributed. In fact, however, the use of blotter paper as a carrier medium has exactly that effect. It makes it possible to divide a small volume of a highly potent drug into a large number of easily separable units containing a single dose—something that could not easily be done by distributing the drug in pure form, straight from the bottle.

Pure LSD is extremely potent; only a tiny amount is necessary to achieve the hallucinogenic effect that users seek. "Single dosage" units of LSD are so small that the liquid chemical must be added to some carrier for the drug to be distributed at the street level.[10] In order for it to be marketable, therefore,

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[10] "To give some idea of the small bulk involved, it would only require 3 ozs of the drug to provide effective doses for

pure liquid or solid LSD must be converted into an easily carried, dispensed, and ingested form.

Blotter paper fills that role perfectly. *United States* v. *Bishop*, 894 F.2d at 985; *United States* v. *Rose*, 881 F.2d at 388; *United States* v. *Marshall*, 706 F. Supp. at 652; T. Cox, *supra*, at 308-309. Because it is so well suited to carrying very small quantities of LSD in a readily distributable, concealable, and ingestible form, blotter paper serves a vital function in the wholesale and retail distribution of LSD. See *United States* v. *Bishop*, 894 F.2d at 985 ("The blotter paper serves the purpose of making the LSD ready for retail sale and ingestion by the user."). The Fourth Circuit was therefore correct in noting that "LSD 'carriers' serve precisely the same *function* as the more familiar 'cutting agents' which are typically used with other drugs," since carriers enable a dealer to distribute the drug in large quantities in an easily ingestible form. *United States* v. *Daly*, 883 F.2d at 318. "What is important is that the blotter paper itself can be and is ingested with the drug much the same as any dilutant or cutting agent would be ingested." *Ibid.* (quoting *United States* v. *Bishop*, 704 F. Supp. at 911). See also *United States* v. *Elrod*, 898 F.2d at 62; *United States* v. *Bishop*, 894 F.2d at 985. Treating blotter paper as a "mixture or substance containing a detectable amount of" LSD is consistent with the way that carrier mediums and cutting agents are treated in the case of other controlled substances.

Congress made clear in the 1986 Act that it intended the penalties to be graduated according to the

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every man[,] woman, and child in a city the size of Glasgow!" B. Wells, *Psychedelic Drugs* 47 (1973).

weight of the drugs in the form in which they were found—cut or uncut, pure or impure, ready for wholesaling, or ready for distribution at the retail level. See H.R. Rep. No. 845, *supra*, Pt. 1, at 12 (quantities of drugs triggering the new threshold penalties "are not necessarily quantities of pure substance"), 17-18. For LSD, that means including the weight of a carrier medium such as blotter paper if the drug is found in a state ready for retail distribution, as it was in this case.

Chapman argues that the "mixture or substance" clause cannot be given its dictionary meaning because, if it is, the clause could be read to include carriers like "a sugar cube, a heavy jar, or a Buick." Chapman Br. 12. For that reason, he argues, the "mixture or substance" clause is ambiguous. That argument is unpersuasive. To paraphrase *United States* v. *Monsanto*, 109 S. Ct. 2657, 2663 (1989), the fact that the Act reaches a carrier like a sugar cube " 'does not demonstrate ambiguity' in the statute; 'It demonstrates breadth.' " At the same time, the Act does not reach "substances" like bottles and cars because they are not ingested along with the drug. When LSD is carried in a jar, the LSD and the jar are not a "mixture or substance" any more than cocaine and tinfoil are a "mixture or substance" when cocaine is carried in a tinfoil packet. The court of appeals therefore correctly recognized that one gram of LSD in a glass bottle that weighs 50 grams is just one gram of LSD, not 51 grams of a "mixture or substance" containing LSD. J.A. 44.

C. Neither The Rule Of Lenity Nor The Canon Of Construing Laws To Avoid Unconstitutionality Applies In This Case

1. Chapman invokes the rule of lenity, claiming that since it is unclear whether a carrier medium is a "mixture or substance" containing a detectable amount of LSD, the Act should be construed to omit any reliance on the carrier medium when determining the total weight of LSD-infused blotter paper. But the rule of lenity is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)). Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). See also, *e.g.*, *Moskal* v. *United States*, 111 S. Ct. at 465; *Russello* v. *United States*, 464 U.S. at 29; *United States* v. *Turkette*, 452 U.S. 576, 587-588 n.10 (1981).

The statute and the Sentencing Guidelines direct that the weight of any ingestible LSD carrier medium containing a detectable amount of LSD be included for sentencing purposes; the legislative history of the Act does not undermine that conclusion in any way; and a straightforward reading of the statute does not produce a result "so 'absurd or glaringly unjust,'" *United States* v. *Rodgers*, 466 U.S. 475,

484 (1984) (quoting *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932)), as to raise a "reasonable doubt" about Congress's intent, *Moskal* v. *United States*, 111 S. Ct. at 465. Under these circumstances, there is no occasion to resort to the rule of lenity.

In an effort to show that the "mixture or substance" clause is ambiguous, Chapman relies on the fact that one district court has held that the clause excludes LSD-infused blotter paper. Chapman Br. 18, citing *United States* v. *Healy*, 729 F. Supp. at 142-144. This Court, however, recently rejected precisely that type of claim in *Moskal* v. *United States*, *supra*. In *Moskal*, the Court made clear that a law cannot be deemed "ambiguous" simply because there is "a division of judicial authority" over its proper interpretation; otherwise, "one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one." 111 S. Ct. at 465. That one district court has disagreed with six circuits over the interpretation of Section 841 therefore hardly means that the law is ambiguous; indeed, the unanimity of the courts of appeals on the subject tends to suggest just the opposite.

As other support for his argument, Chapman claims that "[s]ome members of Congress agree that the use of the phrase 'mixture or substance containing a detectable amount of LSD' was less than precise." Chapman Br. 18. Chapman relies upon two items: (1) a letter by Sentencing Commission Chairman Wilkins to Senator Biden in which Chairman Wilkins said that Congress might wish to clarify 21 U.S.C. 841 by expressly including or excluding LSD carrier mediums, and (2) two bills introduced by Senators Biden and Kennedy that would have excluded LSD carrier mediums from the "mixture or substance" clause.

In 1989, Senator Biden forwarded to Sentencing Commission Chairman Wilkins a letter written on behalf of Sidney Bishop, the defendant in *United States* v. *Bishop*, *supra*, complaining about the inclusion of carrier mediums in the calculation of sentences for LSD offenses. Chairman Wilkins replied by explaining that the Sentencing Commission had previously solicited public comment on this issue, 54 Fed. Reg. 9136 (1989), and that "[a]fter thorough consideration, it was the Commission's view that the term *mixture* under the guidelines should be defined as having the same meaning as under the Controlled Substances Act." Marshall C.A. App. 164. Chairman Wilkins also stated that "[i]t is indisputable that, in general, under the Anti Drug Abuse Act of 1986, Congress rejected linking punishment levels to drug purity," yet "[w]ith respect to LSD, it was unclear whether Congress intended the carrier to be considered as packaging material, or since it is commonly consumed along with the illicit drug, as a dilutant ingredient in the drug mixture." *Id.* at 165; J.A. 46-47. Chairman Wilkins suggested that Congress may wish to clarify its intent by expressly choosing one approach or the other. Marshall C.A. App. 165; J.A. 47.

Senator Biden thereafter introduced an amendment to the Administration's crime bill, S. 1711, 101st Cong., 1st Sess. (1989), that would have amended the Anti-Drug Abuse Act of 1986 by omitting the weight of an LSD carrier medium. See 135 Cong. Rec. S12,748 (daily ed. Oct. 5, 1989) (prepared statement describing Amendment No. 976). The bill passed by the Senate, however, did not contain Senator Biden's amendment. 135 Cong. Rec. S13,433-S13,469 (daily ed. Oct. 16, 1989). Senator Kennedy introduced a different bill that also would

have excluded carrier mediums, see 136 Cong. Rec. S7069-S7070 (daily ed. May 24, 1990) (Amendment No. 1716 to S. 1970), but that amendment likewise did not become law.

All this is ultimately of little weight. As this Court has stated time and again, subsequent legislative history is a treacherous guide to congressional intent, especially if it takes the form of amendments proposed by individual legislators. See *Pierce* v *Underwood*, 487 U.S. 552, 566-567 (1988); *Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 733-734 & n.14 (1977); *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring in part). As the court of appeals recognized, the materials Chapman cites reflect only an "ongoing debate[]," and not "the views of [a subsequent] Congress." J.A. 46. In any event, the fact that clarifying legislation has been proposed does not mean that the statutory text in question provides no guidance and must be construed in favor of the defendant. Congress often proposes and adopts clarifying amendments to statutes to resolve questions of statutory construction without the need for litigation. But Congress's efforts to save the courts from sometimes difficult exercises in statutory construction should not be parlayed into a maxim that the rule of lenity must be applied any time Congress—or some Members of Congress—have proposed clarifying legislation of some kind.

The same principle applies to the observations of Chairman Wilkins regarding the "mixture or substance" clause. In his letter to Senator Biden, Chairman Wilkins acknowledged that it was open to debate whether Congress intended to include LSD carrier mediums within the "mixture or substance" clause of Section 841(b)(1). For that reason, he

suggested that Congress might wish to settle the matter by legislation. But Chairman Wilkins' reference to the failure of the statute to resolve that issue explicitly does not mean that he, or the Sentencing Commission, regarded the "mixture or substance" clause as insolubly ambiguous as applied to LSD.[11]

2. Chapman invokes the canon initially and most prominently set forth in *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), that the "spirit" of a law should prevail over its "letter" when it appears unlikely that Congress intended the harsh outcome that the language seems to compel. Chapman maintains that the "mixture or substance" clause should not be read in "[a] lockstep" fashion that its text dictates. Chapman Br. 21 n.24; *id.* at 18-21. His appeal to the spiritual dimension of the law scarcely justifies disregarding the plain meaning of statutory text and the Guidelines.

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[11] Prior to Chairman Wilkins' letter, the Technical Assistance Service of the Sentencing Commission issued an informal commentary entitled *Questions Most Frequently Asked About the Sentencing Guidelines, reprinted in* T. Hutchison & D. Yellen, *Federal Sentencing Law and Practice* Supp. App. 4 (1989). In that commentary, the staff noted that "the Commission has not addressed the issue" whether the weight of "blotter paper or sugar cubes on which LSD or some other controlled substance has been absorbed" should be included in calculating the total weight of the controlled substance. See T. Hutchison & D. Yellen, *supra*, Supp. App. 4, at 141. The staff commentary, however, simply indicates that the Commission sought to ensure that the Guidelines would be construed *in pari materia* with the statute with respect to the "mixture or substance" clause. Thus, the commentary explains that the courts would have to determine whether carriers should be counted in calculating the total weight of a controlled substance. *Ibid.* The courts of appeals have done so, and all agree on the answer.

Because LSD is sold by the dose, not by its weight, Chapman argues that the weight of an LSD carrier should not be counted for sentencing purposes. But "[t]he short answer is that Congress did not write the statute that way." *Russello* v. *United States*, 464 U.S. at 23. Congress rejected a "pure drug" system of sentencing in favor of a system that depends on the combined weight of the drug and its carriers medium or dilutant, regardless of the amount of the pure drug —or the number of doses—that may be contained in a carrier of a particular weight.

Chapman maintains that Congress could not have intended to include the weight of an LSD carrier medium for sentencing purposes, because the carrier will constitute nearly all of the weight of the entire unit and because the weight of the unit will vary greatly depending on the choice of carriers having different weights, such as blotter paper, gelatin, or sugar cubes. Chapman Br. 9-14. But the same point can be made about drugs like heroin and cocaine, as to which Congress clearly intended the dilutant or carrier medium to be included in the weight for sentencing purposes.

In the case of heroin or cocaine, inactive ingredients, or "cutting agents," are combined with the pure drug, and the mixture is then sold as a heavily diluted form of the drug. In some cases, the concentration of the drug in the carrier is very low. *E.g.*, *United States* v. *Buggs*, 904 F.2d 1070 (7th Cir. 1990) (1.2% heroin); *United States* v. *Dorsey*, 591 F.2d 922 (D.C. Cir. 1979) (2% heroin); *United States* v. *Smith*, 601 F.2d 972 (8th Cir.) (2.7% and 8.5% heroin quantities), cert. denied, 444 U.S. 899 (1979); J. Platt, *Heroin Addiction: Theory, Research, and Treatment* 48-50 (2d ed. 1986) (2-3% heroin). Those concentrations are somewhat higher, but still of the

same order of magnitude as the concentration of the LSD in the blotter paper sold by Chapman (0.877%) and Marshall (0.59%). J.A. 41 & n.1.

Moreover, as in the case of LSD when different carrier mediums are used, the level of purity of heroin and cocaine on the market varies greatly. *E.g.*, *United States* v. *Monu*, 782 F.2d 1209 (4th Cir. 1986) (14-18% heroin); *United States* v. *Mendes*, 912 F.2d 434 (10th Cir. 1990) (47% heroin); *United States* v. *Beissel*, 901 F.2d 1467 (8th Cir. 1990) (77% cocaine); *United States* v. *Williams*, 894 F.2d 208 (6th Cir. 1990) (87% cocaine); Office of Intelligence, DEA, *Domestic Monitor Program* ii (Apr.-June 1990) (purity of retail purchases of heroin ranged from 0.6% to 75.9%); *id.* at 6 (heroin purity in ten selected cities ranged from 3.1% in Baltimore to 41.4% in New York). Of course, decreasing heroin or cocaine purity by adding increasing amounts of a cutting agent can dramatically increase the total weight of the drug, and thus increase the sentencing level under a weight-based sentencing scheme. Yet Chapman does not suggest that Congress did not intend to adopt a weight-based approach in the case of those drugs. Since the effect is similar in the case of LSD, the dilution rate in the case of that drug is not a sufficient reason for disregarding the text of Section 841 with respect to LSD alone.

3. Finally, Chapman argues (Br. 28) that carriers should be excluded from the "mixture or substance" clause based on the maxim that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction. That canon is "quite often useful in close cases, or when statutory language is ambiguous," but it is "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Monsanto*, 109 S. Ct. at 2664

(quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)). That canon comes into play only if there are "fair alternatives" to the supposedly unconstitutional interpretation, *United States* v. *Rumely*, 345 U.S. 41, 45 (1953), or a different construction of a law is "fairly possible," *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). See also *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979); *Swain* v. *Pressley*, 430 U.S. 372, 377-378 & n.11 (1977). But this body of authority is unavailing here; the text of the Act is simply not, for the reasons stated above, insolubly ambiguous, and its application prescribed by the court of appeals is constitutional, for the reasons stated below.

II. CONGRESS ACTED RATIONALLY IN INCLUDING THE WEIGHT OF LSD CARRIER MEDIUMS FOR SENTENCING PURPOSES

A. A Convicted Defendant Does Not Have A "Fundamental Right" To Have The Courts At Sentencing Reassess The Appropriate Penalty For His Crime

Chapman and Marshall maintain that the penalty scheme of the Anti-Drug Abuse Act of 1986 is unconstitutional. They contend that a criminal defendant has a "fundamental right to fair treatment in sentencing," that a sentencing scheme must be subject to "strict scrutiny," and that "a legislative scheme that impairs that right can thus survive only if it is justified by a compelling and substantial government interest." Chapman Br. 29-32; Marshall Br. 83-88.

That contention is unsupportable. This Court has consistently applied a "rational basis" standard of review in assessing the constitutionality of sentencing

provisions.[12] That standard of review follows quite naturally from the general principles describing the operation of the criminal adjudicatory process. Every person has a fundamental right to liberty (and life) in the sense that the government may not punish a person unless and until it proves his guilt beyond a reasonable doubt at a criminal trial in accordance with relevant guarantees. *Bell* v. *Wolfish*, 441 U.S. 520, 535-536 & n.16 (1979). See *United States* v. *Salerno*, 481 U.S. 739, 746-747 (1987). But the corollary to that rule is that if a person has been fairly convicted of a crime, he is eligible for and the government can impose whatever punishment is authorized by statute for his offense, as long as that penalty is not cruel and unusual. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 92 n.8 (1986); *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976).[13] Accordingly, once a defendant has been validly convicted of a crime,

[12] See, *e.g.*, *Stanford* v. *Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion) (dictum); *Dobbert* v. *Florida*, 432 U.S. 282, 301 (1977); *Marshall* v. *United States*, 414 U.S. 417, 421-422 (1974); *McGinnis* v. *Royster*, 410 U.S. 263, 270 (1973); *Leary v. United States*, 395 U.S. 6 (1969); *Turner* v. *United States*, 396 U.S. 398 (1970); *Tot* v. *United States*, 319 U.S. 463 (1943); *Finley* v. *California*, 222 U.S. 28 (1911).

[13] There is no force to Marshall's contention (Br. 89-97) that the Eighth Amendment renders his sentence unlawful. In *Hutto* v. *Davis*, 454 U.S. 370 (1982), this Court held that a 40-year sentence is not excessive for distributing nine ounces of marijuana. Marshall received half that penalty for a more serious crime; Chapman and his cohorts received even lighter sentences. The courts of appeals have routinely upheld comparable sentences for similar conduct and have frequently upheld sentences of life imprisonment without parole for drug trafficking crimes. See App. B, *infra*. The sentences imposed in this case are not unduly harsh by comparison.

the Due Process Clause requires no more than that the statutory scheme under which he is sentenced not be arbitrary or irrational.[14]

B. Including The Weight Of An LSD Carrier Medium Does Not Violate The Due Process Clause By Making The Defendant's Sentence Hinge On An Arbitrary Factor

Congress devised the penalty scheme in the Anti-Drug Abuse Act of 1986 with the goal of severely punishing large-volume drug traffickers. H.R. Rep. No. 845, *supra*, Pt. 1, at 12, 17. The Act's penalty scheme assigns more severe penalties to the distribution of larger quantities of drugs, and therefore serves the purpose of attacking large-scale drug distribution at any level. By measuring the quantity of the drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme, as every court of appeals that has addressed the issue has held.[15]

[14] Chapman's and Marshall's argument fares no better when phrased in equal protection terms, because the equal protection principles they invoke in this context spring entirely from the Due Process Clause, see *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), and their equal protection argument "essentially duplicates" their due process argument. *Jones* v. *United States*, 463 U.S. 354, 362 n.10 (1983).

[15] See *United States* v. *Mendes*, 912 F.2d at 439; *United States* v. *Murphy*, 899 F.2d 714, 717 (8th Cir. 1990); *United States* v. *Bishop*, 894 F.2d at 986-987; *United States* v. *Mendoza*, 876 F.2d 639, 641 (8th Cir. 1989); *United States* v. *Holmes*, 838 F.2d 1175, 1177-1178 (11th Cir.), cert. denied, 486 U.S. 1058 (1988); *United States* v. *Klein*, 860 F.2d 1489,

First, it is typically the case that, up to the point that the market will allow, diluting a drug increases the trafficker's profits and allows him to distribute his wares more widely. Tying the penalty to the amount of the substance in its diluted form is therefore consistent with combatting the evils of wide distribution and large profit. Second, many narcotics prosecutions must be brought without an opportunity to test the drugs. For example, in a conspiracy or attempt case, the drugs may never actually be produced or seized, and it may therefore be impossible to know the purity of the substance that was to be supplied. It is far simpler, in a case in which a defendant agrees to produce a kilogram of cocaine, to charge him with responsibility for selling a kilogram of the drug, without inquiring whether the drug was likely to be substantially diluted when he produced it.

Although tying the penalty to the combined weight of the drug and the carrier medium might be viewed as resulting in lighter sentences for persons at the top of the distribution chain, who often possess drugs in purer form, that is not necessarily so, since the statute and the Sentencing Guidelines contain various measures that work to increase the penalties for high-level traffickers. The Act creates a broad sentencing range for distributing a particular amount of LSD, and the court can sentence the defendant within that range in a manner reflecting his status. Major drug traffickers can be prosecuted for conducting a "continuing criminal enterprise." See 21 U.S.C. 848; *Garrett* v. *United States*, 471 U.S. 773 (1985). Similarly, the Sentencing Guidelines allow a court to sen-

1501 (9th Cir. 1988); *United States* v. *Hoyt*, 879 F.2d 505, 512 (9th Cir. 1989); *United States* v. *Savinovich*, 845 F.2d 834, 839 (9th Cir.), cert. denied, 488 U.S. 943 (1988); *United States* v. *Ramos*, 861 F.2d 228, 231-232 (9th Cir. 1988).

tence a defendant at the higher end of the indicated range, or to depart upward from that range, if the drug sold is "unusually pure" and "indicate[s] a prominent role in the criminal enterprise and proximity to the source of the drugs." *Guidelines Manual* 2.48-2.49. See *United States* v. *Iguaran-Palmar*, No. 89-2143 (1st Cir. Feb. 4, 1991), slip op. 5-6. The Sentencing Guidelines also require the court to increase the defendant's base offense level if he was "an organizer or leader" or a "manager or supervisor" of a criminal enterprise, Sentencing Guidelines § 3B1.1 (a)-(c), if he is a "career offender," *id.* § 4B1.1, or if he makes his living from crime, *id.* § 4B1.3. Accordingly, the penalty scheme is not irrational because, acting alone, the "mixture or substance" clause may result in higher penalties for traffickers who are lower on the distribution chain.

The statute and the Sentencing Guidelines also operate rationally in the case of LSD. Congress could have set the penalty scale based on the weight of the pure drug or the approximate number of doses sold, but having chosen a weight-based approach instead, it was not irrational for Congress to include the weight of the carrier medium for LSD. As in the case of other drugs, the weight of the drug and carrier medium that the trafficker uses to distribute it serves as a rough proxy for the size of the defendant's criminal enterprise.

Chapman and Marshall do not claim that the sentencing scheme devised by Congress and the Sentencing Commission has produced an arbitrary array of sentences. Nor did their motions in the district court contain any such proof.[16] Instead, they chal-

[16] See Defendant Chapman's Motion Challenging Applicability of Mandatory Minimum Sentence and Sentencing Guidelines at Sentencing (Oct. 4, 1989); Memorandum in Support

lenged the Act on its face on the ground that it will inevitably lead to lengthy and arbitrary punishments by including the weight of an LSD carrier. Chapman and Marshall contend that the penalty scheme of the 1986 Act is irrational because LSD is sold by the dose, not by weight. A person who uses blotter paper instead of gelatin to distribute LSD, they argue, commits the same crime, sells the same number of doses and amount of the drug, receives the same profit, inflicts the same societal injury, deserves the same moral blame, and, therefore, should receive the same punishment. Yet a person who uses blotter paper instead of gelatin can receive a more severe sentence, because paper is the heavier of the two mediums. Chapman Br. 29-44; Marshall Br. 66-81, 83-97.

There are several answers to this claim. First, it is the trafficker who selects the carrier for the drug. He therefore has control over the extent to which he is exposed to greater sentences because of his use of a heavier carrier.

Second, while curious hypothetical cases can be imagined, involving very heavy carriers and very little LSD (a single dose on a plate of lasagna), those hypothetical cases are of little value in addressing a claim by persons such as the defendants in this case, who used a standard LSD carrier. See J.A. 61 (noting that blotter paper "seems to be the

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of Defendant Chapman's Motion Challenging Applicability of Mandatory Minimum Sentence and Sentencing Guidelines at Sentencing (Oct. 4, 1989); Notice of Motion and Motion to Adopt Co-defendants' Sentencing Motions (Oct. 11, 1989); Motion for Order Declaring 21 U.S.C. Sec. 841 Mandatory Minimum Sentence for LSD Violates the Due Process and Equal Protection Clauses of the United States Constitution (Oct. 2, 1989).

norm these days"). No First Amendment concern is remotely implicated here, so neither Chapman nor Marshall has standing to challenge the sentence that a trafficker would receive for using much heavier carriers to distribute LSD. See, *e.g.*, *Osborne* v. *Ohio*, 110 S. Ct. 1691, 1697 & n.8 (1990); *United States* v. *Salerno*, 481 U.S. at 745.

Finally, the same objection could be lodged against a statute that imposed a fixed sentence for distributing any quantity of LSD, in any form, with any carrier. Had Congress enacted such a statute, opting for a pure determinate sentencing system, a person who sold 1 dose of LSD would receive the same punishment as one who sold 10,000 doses. Although such a sentencing scheme would be lacking in flexibility, it would clearly be constitutional. Congress has the power to define criminal punishments and to deny the courts any sentencing discretion. This Court expressly so held in *Ex parte United States*, 242 U.S. 27, 42 (1916), reasoning that "the authority to define and fix the punishment for crime is legislative." As has been noted, "in non-capital cases, the [once] established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes." *Lockett* v. *Ohio*, 438 U.S. 586, 604-605 (1978) (plurality opinion). See also *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989).[17]

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[17] Determinate sentences were found in the Nation's penal codes during its earliest days, see *United States* v. *Grayson*, 438 U.S. 41, 45-46 (1978); *United States* v. *Pinto*, 875 F.2d 143, 145 (7th Cir. 1989), and some have survived into modern times. See, *e.g.*, 18 U.S.C. 1111 (mandatory life imprisonment under federal first-degree murder statute); 21 U.S.C. 848(b) (mandatory life imprisonment for violation of drug "super-kingpin" statute); 18 U.S.C. 2114 (1982) (flat 25-

The current sentencing scheme for narcotics violations contains elements of both determinate and discretionary sentencing. Like any determinate sentencing scheme, the Anti-Drug Abuse Act of 1986 and the corresponding Sentencing Guidelines may lead to seemingly inequitable results in some cases. But that is not a sufficient reason to hold the sentencing scheme unconstitutional. As the Court explained in *City of Dallas* v. *Stanglin*, 490 U.S. 19, 26-27 (1989) (quoting *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (citations omitted)), "[i]f the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

At the same time, the penalty scheme for the distribution of LSD is not as draconian or inflexible as Chapman and Marshall suggest. The Sentencing Reform Act of 1984 and the Sentencing Guidelines grant the courts the discretion to depart downward from the Guidelines sentencing range in appropriate cases. 18 U.S.C. 3553(b); Sentencing Guidelines § 5K2.0 (Policy Statement). Moreover, the Act and the Guidelines authorize a court under proper circumstances to depart downward even from the sentence imposed by a mandatory minimum sentencing law. If a defendant offers the government substantial assistance and the government moves for a reduction in the defendant's sentence, a district court can reduce a defendant's sentence below a statutory mandatory minimum provision. 18 U.S.C. 3553(e); Sentencing Guidelines § 5K1.1 (Policy Statement). Those provisions can soften the effects of a rigid sentencing scheme. Indeed, that is what happened in this case, where Chapman, Schoenecker, and Brumm all benefited from those departure provisions. The government filed a motion under Sentencing Guidelines § 5K1.1, asking the district court to reduce their sentences below the Guidelines sentencing range, and the court did so. Thus, as illustrated by the sentences imposed in this case, the inclusion of the weight of the carrier medium in calculating the statutory and Guidelines offense level does not necessarily produce results so arbitrary or irrational as to violate the Due Process Clause.

---

year sentence for armed robbery of a postal carrier upheld against due process challenge in, *e.g.*, *United States* v. *Smith*, 602 F.2d 834 (8th Cir.), cert. denied, 444 U.S. 902 (1979), and *Smith* v. *United States*, 284 F.2d 789, 791 (5th Cir. 1960)).

C. Including The Weight Of An LSD Carrier Medium As Part Of The Statutory "Mixture Or Substance" Does Not Render The Statute Unconstitutionally Vague

Marshall maintains that including the weight of an LSD carrier for sentencing purposes renders the statute unconstitutionally vague. Marshall Br. 81-83. That claim clearly lacks merit.

Because Section 841 does not infringe First Amendment freedoms, Marshall's challenge must be evaluated in light of the facts of his case. The relevant issue is whether he had fair notice that he would be subject to sentencing on the basis of the combined weight of the LSD and the carrier medium. *United States* v. *Powell*, 423 U.S. 87, 92 (1985); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). If he did, he cannot complain that the Act could be unconstitutionally vague when applied to others. *Hoffman*

Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

Marshall had such notice. The "mixture or substance" clause is sufficiently clear "to give a person of ordinary intelligence fair notice" that his contemplated conduct is covered by the statute. *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Moreover, in 1987, a year before Marshall's offense, the Eighth Circuit had indicated in *United States* v. *McGeehan*, 824 F.2d at 681, that the Anti-Drug Abuse Act of 1986 required the courts at sentencing to include the weight of an LSD carrier, and no court had held to the contrary. Finally, Marshall does not suggest that in deciding to use blotter paper as a carrier medium, he relied on his belief that any penalty he would suffer would be based only on the weight of the pure LSD that he was distributing, rather than the combined weight of the drug and the paper.[18]

Marshall contends that the statute was impermissibly vague because it had not yet been "definitively construed" when he distributed LSD. Marshall Br. 82. Under that test, however, no statute could ever afford fair notice until it had been construed by this

[18] The district court found that the gross weight of the LSD-infused blotter paper distributed by Marshall was 113.32 grams. 706 F. Supp. at 651. Under the Sentencing Guidelines, the distribution of 100 or more grams of an LSD-infused carrier results in a base offense level of 36. Marshall received a two-level increase to level 38 under Sentencing Guidelines § 3B1.1(c) for being an organizer, leader, manager, or supervisor of the LSD distribution scheme. Marshall also fit into Criminal History Category I. With a total offense level of 38 and a Criminal History Category of I, the Sentencing Guidelines set a range of 235-293 months' imprisonment. *Guidelines Manual* 5.2 Sentencing Table (Oct. 1987); Marshall Presentence Report 14-18 (June 5, 1989).

Court. No decision by this Court supports that conclusion, and *United States* v. *Rodgers*, 466 U.S. at 484, is to the contrary. *Rodgers* held that a defendant had fair notice of the meaning of a statute even though the court of appeals for the circuit in which the charged conduct took place had previously ruled that that conduct was not a crime. Marshall's claim of lack of fair notice falls, *a fortiori*, in light of *Rodgers*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

FEBRUARY 1991

APPENDIX A

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment provides in part that "nor shall any person * * * be deprived of life, liberty, or property without due process of law."

2. The Eighth Amendment provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. 21 U.S.C. 841 provides in relevant part:

(a) Unlawful acts

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; * * *

(b) Penalties

> Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a violation of subsection (a) of this section involving—
>
> * * * * *

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life * * *

(B) In the case of a violation of subsection (a) of this section involving—

* * * * *

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years * * *.

4. United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1 Application Note 9, at 2.48-2.49 (1990), provides as follows:

> Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity (*see* the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are

> often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

5. United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1 Application Note 11, at 2.52-2.53 (1990), provides in part as follows:

> If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (*e.g.*, 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT
(DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

LSD (Lysergic acid diethylamide) *	.05 mg
MDA *	100 mg
Mescaline	500 mg
PCP *	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin *	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin *	10 mg
2, 5-Dimethoxy-4-methylamphetamine (STP, DOM) *	3 mg

* * * * *

* For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

APPENDIX B

1. In the following cases, the courts of appeals upheld sentences to terms of imprisonment for drug trafficking crimes of comparable length to the sentences imposed on Chapman and Marshall. *E.g.*, *United States* v. *Rhodes*, 779 F.2d 1019, 1027-1028 (4th Cir. 1985) (50 and 75 years for operating a Continuing Criminal Enterprise (CCE), 21 U.S.C. 848), cert. denied, 476 U.S. 1182 (1986); *United States* v. *Harrington*, 761 F.2d 1482, 1485-1487 (11th Cir. 1985) (40 years for CCE); *United States* v. *Darby*, 744 F.2d 1508, 1525-1529 (11th Cir. 1984) (60 years for CCE), cert. denied, 471 U.S. 1100 (1985); *United States* v. *Ortiz*, 742 F.2d 712, 717 (2d Cir.) (ten-year sentence for the sale of six glassine envelopes of heroin), cert. denied, 469 U.S. 1075 (1984); *United States* v. *Amend*, 791 F.2d 1120 (4th Cir.) (30 years), cert. denied, 479 U.S. 930 (1986); *Bellavia* v. *Fogg*, 613 F.2d 369 (2d Cir. 1979) (15 years to life for acting as the driver of car that contained cocaine of others); *Carmona* v. *Ward*, 576 F.2d 405, 414-415 (2d Cir. 1978) (maximum sentence of life imprisonment for street sale of a small amount of cocaine), cert. denied, 439 U.S. 1091 (1979); *Salazar* v. *Estelle*, 547 F.2d 1226 (5th Cir. 1977) (45 years for sale of small quantity of heroin); *United States* v. *Fiore*, 467 F.2d 86, 90 (2d Cir. 1972) (20-year sentence without parole for sale of 40.73 grams of heroin), cert. denied, 410 U.S. 984 (1973). Similar sentences have been imposed in other cases. See *United States* v. *Garrett*, 727 F.2d 1003, 1006-1007 (11th Cir. 1984) (40 years for CCE), aff'd on other grounds, 471 U.S. 773 (1985); *United States* v. *Phillips*, 664 F.2d 971, 985 n.2 (5th

Cir. 1981) (64, 53, and 33 years for CCE), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Webster*, 639 F.2d 174, 180 (4th Cir.) (50 years for CCE), cert. denied, 454 U.S. 857 (1981).

2. In the following cases, the courts upheld sentences of life imprisonment without parole for drug trafficking crimes. *E.g.*, *Young* v. *Miller*, 883 F.2d 1276 (6th Cir. 1989), petition for cert. pending, No. 89-6960; *United States* v. *Martorano*, 866 F.2d 62, 69-70 & n.6 (3d Cir. 1989), cert. denied, 110 S. Ct. 1128 (1990); *United States* v. *Aiello*, 864 F.2d 257 (2d Cir. 1988) (life imprisonment without parole plus 140-year consecutive sentence); *Terrebonne* v. *Butler*, 848 F.2d 500 (5th Cir. 1988) (en banc), cert. denied, 489 U.S. 1020 (1989); *United States* v. *Milburn*, 836 F.2d 419, 421-422 (8th Cir.), cert. denied, 487 U.S. 1222 (1988); *United States* v. *McCann*, 835 F.2d 1184, 1187-1190 (6th Cir. 1987), cert. denied, 486 U.S. 1026 (1988); *United States* v. *Stewart*, 820 F.2d 1107 (9th Cir.) (Kennedy, J.) cert. denied, 484 U.S. 867 (1987); *United States* v. *Erwin*, 793 F.2d 656, 668-669 (5th Cir.), cert. denied, 479 U.S. 991 (1986); *United States* v. *Valenzuela*, 646 F.2d 352 (9th Cir. 1980). Similar sentences have been imposed in other cases. See *United States* v. *Gallo*, F.2d 1504, 1508-1509 (6th Cir. 1985); *United States* v. *Thomas*, 757 F.2d 1359 (2d Cir. 1985); *Williams* v. *United States*, 731 F.2d 138 (2d Cir. 1984), cert. denied, 469 U.S. 1188 (1985); *United States* v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

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In The

Supreme Court of the United States

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

T. CHRISTOPHER KELLY
(Appointed By This Court)
121 South Hamilton Street
Madison, Wisconsin 53703
(608) 255-6607

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. AN LSD CARRIER IS NOT A "MIXTURE OR SUBSTANCE CONTAINING" LSD

As Judge Posner lamented in dissent, "the Justice Department cannot explain the *why* of the punishment scheme it is defending." J.A. 79 (Posner, J., dissenting) (emphasis added). The Government raises a number of arguments in its effort to preserve a system that guarantees arbitrary punishments, but it still has not explained *why* the law should be interpreted to require equally culpable, identically situated offenders to serve vastly different sentences for LSD distribution, depending on the weight or absence of an LSD carrier. Since LSD is sold by the dose, not by weight, and since the weight of the particular carrier chosen by the dealer bears no rational relationship to that person's culpability or moral fault, basing a sentence on the weight of an LSD carrier makes "about as much sense as basing punishment on the weight of the defendant." J.A. 78 (Posner, J., dissenting). *Why* would Congress want to punish a seller of 1,000 doses of LSD adhered to blotter paper more severely than an identical seller of 1,000 doses of LSD adhered to gelatin capsules? The Government cannot answer the question, because no rational explanation can be invented to support that interpretation of the law.

In its attempt to justify this senseless interpretation, the Government has adopted inconsistent positions. On the one hand, the Government argues that the plain language of 21 U.S.C. § 841(b)(1) must be followed. On the other hand, the Government acknowledges that a literal reading of the statute is absurd, and seeks to engraft an "ingestibility" requirement onto the law. Neither position withstands careful analysis.

A. The Words "Mixture or Substance Containing" LSD Are Ambiguous

The Government argues that "the statute makes it quite clear that if a drug and the carrier medium together can be considered a 'mixture or substance,' it is the gross weight of the drug and the carrier medium that determines the applicable penalty, not the weight of the pure drug that may be

contained in the carrier medium." Gov't Br. 12. Yet 21 U.S.C. § 841(b)(1) makes no reference to a "carrier medium," and it is not at all clear, by reference to the language of the statute itself, that Congress intended a carrier to be a "mixture or substance containing" LSD. Heroin carriers (such as syringes) and cocaine carriers (such as vials and valises) do not determine federal sentences. The Government identifies no purpose the statute would serve by treating LSD carriers differently.

The plain meaning of the phrase "mixture or substance containing" LSD excludes LSD carriers from sentencing calculations. The blotter paper to which LSD is adhered is not a "mixture" with the LSD. A "mixture" consists of two substances blended together so that the particles of one are diffused among the particles of the other. 9 *Oxford English Dictionary* 921 (1989). Placing a microdot of LSD in the center of a square of blotter paper is not a "mixture," since the LSD is not evenly diffused throughout the paper. Spraying blotter paper with LSD causes the LSD to cling to the surface of the paper, but the LSD does not "mix" with the paper.

Nor, in the technical sense in which the statute was intended to be read, is the combination of blotter paper and LSD a "substance" that contains LSD. A "substance" is a "chemical element or compound." *Hawley's Condensed Chemical Dictionary* (11th ed. 1987). Paper is not an "element," such as hydrogen or iron, although it is composed of elements. A "compound" consists of "two or more elements chemically combined in fixed proportions." *Webster's New World Dictionary* 291 (2d ed. 1972). A compound is distinguished from a mixture "in that the constituents of a compound lose their individual characteristics and the compound has new characteristics." *Id.* Paper is a compound, a joining of elements to create a new substance with unique characteristics, but it does not "contain" LSD. Adding LSD to blotter paper does not create a new substance. The LSD and the blotter paper retain their separate identities as two separate substances. One does not "contain" the other; LSD adhered to blotter paper is not *contained* within the substance

known as blotter paper. Blotter paper contains various elements, such as carbon and oxygen; LSD is not among them.

These considerations, among others, prompted the *Healy* court to rule that an LSD carrier is *not* literally a "mixture or substance containing" LSD. *United States v. Healy*, 729 F.Supp. 140 (D.D.C. 1990). The strict chemical definitions of "mixture or substance" are the only ones that save the statute from absurdity.

It is true, as the Government argues, that the words "mixture" and "substance" may be given a construction that is "broad enough to include" LSD carriers. Gov't Br. 18. If this construction is adopted, the words are also broad enough to include a vial, a suitcase, or a car that "contains" LSD. The Government suggests that this is not a failing, that the statute demonstrates "breadth" rather than ambiguity. Gov't Br. 21. Yet it is precisely the "breadth" of the statute that renders it ambiguous, and only a narrowing construction can save it from absurdity. Because the Government's reading of the plain language of the statute encompasses vials, suitcases, cars, syringes, shirt pockets, and any other "substance" that might "contain" LSD, this could not have been the meaning intended by Congress.

By agreeing that some substances containing LSD are excluded from the phrase "mixture or substance" – including vehicles and vials – the Government has confessed that its "broad" interpretation of the phrase "mixture or substance containing" LSD is incorrect. The phrase is most rationally given a literal reading that excludes LSD carriers. At best, the phrase may be ambiguous, requiring resort to indicia of legislative intent beyond the words themselves. Yet the Government defends its reading of the statute by importing a concept of "ingestibility" wholly foreign to the text of the statute. The Government argues that "mixture or substance" means "ingestible mixture or substance." Hence, only ingestible substances are to be weighed with the LSD. Neither the word "ingestible," nor any set of words suggesting the concept of "ingestibility," appear in the statute. By trying to engraft that language onto the statute, the Government is acknowledging

that the meaning it advances of the existing language is not plain.

Accepting for the sake of argument that the Government's interpretation is reasonable, it is not the only reasonable interpretation. As is argued below, a more reasonable interpretation, consistent with the unadulterated language of the statute, would limit statutory "substances" to those which increase the total amount of the product available for distribution. This is the interpretation adopted by the five dissenting judges below and by the court in *Healy*.[1] Because this interpretation is reasonable, and because more than one interpretation of the phrase "mixture or substance" is possible, the Court may look to the legislative purpose to buttress the statute's literal language.

B. Congress Did Not Intend to Make Punishments Depend Upon the Ingestibility of the "Mixture or Substance" to Which LSD is Adhered

The Government proposes a reading of the statute that defines the mixtures or substances that should be weighed together with the LSD as those that are "ingestible." Thus, if a dose of LSD is placed on a pizza, the weight of the pizza would determine the sentence. But if a dose of LSD were adhered to a piece of plastic that is not intended for ingestion, the sentence would be based on the weight of the LSD alone.

Judge Posner demonstrated the fallacy of the Government's argument by hypothesizing a casual user who delivers a single does of LSD to a friend in a glass of orange juice. The user would be subject to a ten year minimum sentence because orange juice is "ingestible." Yet a dealer selling

---

[1] Another district court, ruling from the bench at a sentencing hearing, construed the statute to avoid absurd results by excluding LSD carriers from the "mixture or substance" that determines a sentence. *United States v. Mendoza-Macias*, No. 89-0932-01-T (S.D. Cal.) (Turrentine, J.). An appeal of that decision is pending before the U.S. Court of Appeals for the Ninth Circuit. *United States v. Mendoza-Macias*, No. 90-50235 (9th Cir.).

199,999 doses on a carrier that is not ingestible, or that is not adhered to a carrier, would be subject only to the five year minimum. J.A. 77 (Posner, J., dissenting).

Nonsensical results such as these illustrate the untenability of the Government's position. Even more telling is the Government's failure to explain *why* use of an ingestible carrier merits a more severe sentence than use of a noningestible carrier, or no carrier. No rational explanation can be imagined.

The Government's interpretation of the statutory language cannot be reconciled with any rational purpose that the statute may have. Hence, the Government's interpretation is specious, for we must assume Congress acted rationally and with a purpose. The Government fails to understand why Congress included the "mixture or substance" language in 21 U.S.C. § 841(b)(1). The language is intended to assure that a dealer who multiplies the amount of a drug to be marketed by "cutting" or mixing the drug with another substance will be sentenced with a view to the larger number of customers who can be supplied because of the cutting agent. *United States v. Holmes*, 838 F.2d 1175, 1177-78 (11th Cir.), *cert. denied*, 486 U.S. 1058 (1988). Blotter paper and other carriers do not increase the numbers of doses of LSD that can be marketed, the number of customers that can be supplied, or the profit derived from the drug. Therefore, the purpose of the statute is not served by including the weight of the LSD carrier in sentencing determinations. Ingestibility has no impact on the number of marketable doses. The Government's failure to show any linkage between the use of an LSD carrier and the social harm caused by use of a cutting agent leads to the rejection of any Congressional intent to include the weight of the carrier, ingestible or otherwise, when determining the weight of a mixture or substance containing LSD.

C. The History of the Statute Supports a Narrow Interpretation of the Phrase "Mixture or Substance" as Applied to LSD

Nothing in the history of 21 U.S.C. § 841(b)(1) supports a legislative intent to distinguish between ingestible carriers

and noningestible carriers. The Government correctly notes that Congress took a "market oriented approach" that enhances punishments for wholesalers and high volume retailers. That approach is not served by punishing dealers who sell a few doses of LSD on a heavy carrier more harshly than dealers who sell many doses of LSD on a light carrier.

The "market" purchases LSD by the dose, not by weight. Sentencing the seller of 100 doses of LSD on blotter paper to twice the term required for an identical seller of 100 doses of LSD on gelatin capsules does not promote a rational "market oriented" system of punishment.[2] The Government can offer no theory to explain why Congress would want such a bizarre result to accrue. The most credible theory is that advanced by Judge Posner in his dissent below: Congress simply did not realize that LSD is sold by the dose, not by weight.[3] J.A. 79 (Posner, J., dissenting).

The best evidence of the legislature's view of LSD is found in the Senate Report accompanying the Criminal Code Reform Act of 1981. While the Act failed to pass, it represented the first attempt to draw "appropriate distinctions between large and casual traffickers." S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981). Thus, the proposed Act followed the same "market oriented approach" that motivated the Anti-Drug Abuse Act of 1986, which imposed more severe sentences upon "major traffickers" or wholesalers and upon "managers of the retail level traffic" who sell "substantial

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[2] The first offender who sells 100 doses of LSD on blotter paper has a Guideline range of 63 to 78 months, while the first offender who sells 100 doses of LSD on gelatin capsules has a Guideline range of 27-33 months. *See* Petitioners' Br. 11.

[3] Judge Posner's dissent also disposes of the Government's argument that the alternative sentencing provisions for PCP and methamphetamine prove that Congress intended to include LSD carriers in the weight of the entire mixture or substance. The Government's suggestion that enacting rational legislation with regard to PCP and methamphetimines evinces a desire to enact irrational legislation with regard to LSD is unpersuasive. It is more likely that Congress simply did not realize that LSD is not sold by weight. J.A. 79 (Posner, J., dissenting).

street quantities." H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). Because the same sentencing goal motivated both bills, the Criminal Code Reform Act of 1981 illuminates the Congressional view of which "marketers" are sufficiently large to merit enhanced punishments.

The proposed 1981 legislation drew the line between "large" and "casual" traffickers of LSD at 5 grams, an amount that is "approximately 100,000 times the average user dose." S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981). Congress in 1981 plainly did not intend to base punishments upon the weight of LSD carriers, since 5 grams can equal 100,000 times a .05 milligram dose of LSD only by *excluding* the weight of its carrier. Congress used the same 5 gram threshold for enhanced sentencing when it enacted the Controlled Substances Penalties Amendments Act of 1984. In the Anti-Drug Abuse Act of 1986, Congress created thresholds for enhanced sentences at 1 gram (5 year minimum) and 10 grams (10 year minimum) of LSD. The Government offers no reason to believe Congress intended these thresholds to reflect anything other than 20,000 and 200,000 doses of LSD. Nothing in the legislative history of § 841(b)(1) suggests that Congress wished to impose a 5 year minimum sentence upon sellers of 1,000 doses, such as petitioners, or that it wished to impose a 10 year minimum upon sellers of fewer than 12,000 doses, such as respondent Marshall.

This sentencing structure is "exceptionally harsh by the standards of the modern Western world," J.A. 81 (Posner J., dissenting), and there is no reason to believe Congress intended it to be so. Nothing in the legislative history even hints that Congress viewed LSD as a pernicious threat warranting such extreme concern.[4] If Congress intended to

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[4] As Judge Posner pointed out, respondent Marshall received a 20 year sentence for selling 12,000 doses of LSD. A comparable sentence for the sale of heroin would have required distribution of 10 kilograms, yielding one to two million doses. A comparable sentence for the sale of cocaine would have required distribution of 50 kilograms, yielding 325,000 to five million doses. Yet LSD is a much less dangerous drug than either heroin or cocaine. J.A. 79-80 (Posner, J., dissenting).

impose such disproportionately severe sentences on LSD dealers, it surely would have said so.

The Government argues that the harshness is mitigated by 18 U.S.C. § 3553(b) and by *Guidelines Manual* § 5K2.0, which authorize downward departures from the minimum sentences and from the Guidelines ranges, respectively, in exchange for a defendant's substantial assistance to the Government. The "mitigation" is illusory for two reasons. First, many of the casual dealers snared in this net (those most in need of mitigation) lack information of sufficient quality or timeliness to merit a downward departure, as much as they might like to earn one. Second, petitioner Chapman, who benefitted from a downward departure, was still sentenced to 8½ years for participating in the sale of 1,000 doses. Had the statute been interpreted rationally to exclude the carrier paper, Chapman's *maximum* guideline sentence would have been 46 months, or less than half his actual, "mitigated" sentence. The "mitigation" afforded by a possible downward departure hardly restores rationality to the sentencing scheme.

The Government argues that the Sentencing Commission "followed Congress's lead and graduated sentences according to the weight of the 'mixture or substance' containing the controlled substance, rather than the actual weight of the controlled substance itself." Gov't Br. 15. Contrary to the Government's assertion, the Commission has given no administrative gloss to the statutory language. The Commission never expressed its own opinion whether the weight of an LSD carrier should determine the defendant's sentence. *See* Petitioners' Br. 19-20. The Commission has passively deferred to whatever judicial construction is ultimately given to the statutory language. U.S. Sentencing Commission, *Guidelines Manual* Appendix C, amend. 123, amending § 2D1.1, Comment., Note 1 (Nov. 1, 1989).

While the legislative history is largely silent on the issue, the existing evidence suggests that Congress intended to reserve minimum sentences for sellers of at least 20,000 doses of LSD. The history offers no support for the Government's position that Congress intended the irrational results that

come from ignoring the realities of LSD marketing by basing sentences upon the arbitrary weight of LSD carriers.

D. Rules of Statutory Construction Require Exclusion of LSD Carriers from the Phrase "Mixture or Substance"

The Government argues that the rule of lenity does not apply in this case, because the law is not ambiguous. The Government makes the same argument to avoid the rule that statutes should be construed to avoid questions about their constitutionality.

If the law were not ambiguous, the Government would not be forced to import an "ingestibility" requirement into the phrase "mixture or substance." For the reasons argued above, and as evidenced by the dissents below, by the decision in *Healy*, and by Congressional attempts to rectify the problem, the law can be most reasonably interpreted to exclude LSD carriers, without resort to an "ingestibility" test, and without reaching absurd results. Because the coexistence of any other reasonable construction would render the phrase "mixture or substance" ambiguous, the rule of lenity and the rule avoiding constructions that cast doubt upon a statute's constitutionality require the law to be narrowly construed in the defendant's favor.[5]

Equally applicable is the rule that statutes should be construed to avoid absurd or unreasonable results. *United*

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[5] When Congress has not "plainly and unmistakably" made its intent clear, the rule of lenity requires doubts to be resolved in the defendant's favor, *United States v. Bass*, 404 U.S. 336, 348 (1971). The Supreme Court has described the rule as a "wise principle" that the Court "has long followed." *Id.* The rule applies here because doubts about whether Congress intended to create a sentencing scheme that operates irrationally are real, not manufactured. For the same reason, the rule favoring a construction that avoids doubts about a statute's constitutionality provides appropriate guidance in this case. *Cheek v. United States*, 111 S.Ct. 604, 611 (1991). As Judge Posner noted, the latter rule is particularly applicable when, as here, the constitutional claim would nullify Congressional action. J.A. 83 (Posner, J., dissenting).

States v. American Trucking Asso., 310 U.S. 534, 543-44 (1940). Rather than reflecting upon, or attempting to justify, the absurd sentencing results that must come about when LSD sentences are based upon the arbitrary weight of the carrier, the Government compares the percentage of LSD in blotter paper that carries that drug to the degree of "purity" of other street drugs, such as heroin or cocaine, and concludes that LSD on a carrier may not be much less "pure" than drugs adulterated by a cutting agent. Gov't Br. 27-28. That comparison is meaningless, because heroin and cocaine are sold be weight. LSD is sold by the dose. A dose of LSD is equally "pure" whether it is placed on a sugar cube, on blotter paper, or ingested directly from a pipette.

Mixing heroin or cocaine with other substances not only reduces the purity of the drug, it enlarges the amount of the product to be marketed. Such is not the case with LSD. Thus, comparing the "purity of LSD to the "purity" of drugs sold by weight does nothing to diminish the absurdity of applying a weight-based sentencing scheme to a drug that is not sold by weight.

The Government disparages what it characterizes are petitioners' "appeal to the spiritual dimension of the law" when petitioners suggest that the statute must be viewed as something more than a collection of disparate words to be applied without regard to the real world. Gov't Br. 26. The Supreme Court has recently reaffirmed that "the meaning of language is inherently contextual,"[6] *Moskal v. United States*, 111 S.Ct. 461, 465 (1990), and has long understood that the ultimate goal of statutory construction is to give effect to the

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[6] *See generally*, F. Frankfurter, *Some Reflections on the Reading of Statutes* 6 (1947) (a statute "is not an equation of formula representing a clearly marked process," but an "instrument of government partaking of its practical purpose but also of its infirmities and limitations, of its awkward groping efforts."); Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 868 (1930) ("A statute is neither a literary text nor a divine revelation.").

legislature's purpose.[7] *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953).

The purpose of the penalty structure enacted by Congress is to punish high volume dealers, both at the wholesale and retail levels, more severely than casual dealers. H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). Basing sentences on the weight or absence of an LSD carrier does nothing to advance that purpose. Moreover, Congress hoped to *eliminate* sentencing disparaties by revising the structure of penalties imposed upon distributors. S. Rep. No. 225, 98th Cong., 1st Sess. 256 (1983). That purpose was also recognized and effectuated by the Sentencing Reform Act of 1984. *See* 18 U.S.C. § 3553(a)(6) (courts must avoid sentencing disparaties among defendants with similar records who commit similar crimes). Imprecise statutory draftsmanship, or absurd readings of literal language, should not be allowed to defeat these purposes.

The construction of 21 U.S.C. § 841(b)(1) adopted by the majority below and advanced by the Government guarantees that LSD sentences will be imposed arbitrarily. The Government cannot explain why Congress would want LSD sentences to be based on a factor that bears no rational relationship to culpability. A reading that yields such an absurd result, unsupported by any manifest intention of Congress, should be rejected in favor of one that reasonably advances the policies and purposes articulated by Congress and that can be supported by a literal reading of the statute. Accordingly, the Supreme Court should hold that LSD carriers are not a "mixture or substance containing" LSD within the meaning of the statute or the Sentencing Guidelines.

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[7] *See also United States v. Whitridge*, 197 U.S. 135, 143 (1905) (Holmes, J.) ("the general purpose is more important than any rule which grammer or formal logic may lay down").

II. BASING A SENTENCE UPON THE WEIGHT OF AN LSD CARRIER VIOLATES A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW

A. Criminal Defendants Have a Fundamental Right to Be Free from Arbitrary Sentences

The Government argues that the fundamental right to liberty ends with a verdict obtained as the result of a procedurally fair trial. At sentencing, the Government contends, the defendant may be given any sentence that is authorized by statute and that is not cruel and unusual. Without explaining why, the Government asserts that this proposition establishes that due process requires only that a sentencing scheme not be arbitrary or irrational. Gov't Br. 30-31. Yet due process protects defendants against unequal treatment at all stages of the criminal justice system, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), and the requirements of due process must be satisfied at sentencing, as well as at trial, *Gardner v. Florida*, 430 U.S. 349, 358 (1977). If the right to due process at trial is fundamental (which seems inarguable), the right to due process at sentencing – including the right to be free from arbitrary governmental action – is equally fundamental.

The cases relied upon by the Government do not focus on the standard of review that applies to a claim that a sentencing scheme is driven by an unconstitutionally arbitrary factor.[8] Nor does the Government address the general

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[8] *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989), did not decide what standard of review should apply to an equal protection challenge to a sentencing scheme because no such challenge was made. *Stanford* was decided under Eighth Amendment standards rather than Fifth Amendment standards. While *Dobbert v. Florida*, 432 U.S. 282 (1977) and *Finley v. California*, 222 U.S. 28 (1911) concerned equal protection claims, the Court did not address the appropriate standard of review and was not asked to determine whether a fundamental right had been violated. *Marshall v. United States*, 414 U.S. 417 (1974), held only that there is no fundamental right to rehabilitation from narcotics addiction at public expense after conviction of a crime. *McGinnis v. Royster*, 410 U.S. 263 (1973), concerned a post-sentencing administrative determination of an

(Continued on following page)

proposition that a legislative classification resulting in imprisonment differs in character from legislative classifications that have no such impact on fundamental rights, to which a rational basis standard of review appropriately applies.

Other rights that have been deemed fundamental, such as the right to travel, are no more important to an individual in a free society than the right to have the length of a governmentally sanctioned deprivation of liberty be determined in a nonarbitrary way. If a defendant received a lengthy sentence because of the color of her eyes or the size of her shoes, the public would be shocked, and courts would quickly agree that the right to have a sentence determined by factors that are relevant, not arbitrary, is fundamental to a criminal justice system that reflects ordered liberty. Basing a sentence upon the weight of an LSD carrier is no less arbitrary, and the right it infringes upon is no less fundamental.

The Government recognizes that due process prohibits arbitrary or irrational sentencing schemes. Gov't Br. 31. The right to be free from such schemes – the right to be sentenced fairly – is fundamental. 2 R. Rotunda, J. Nowak & J. Young. *Treatise on Constitutional Law: Substance and Procedure* § 18.41 at 703 (1986). A claim that a sentencing scheme violates that standard must therefore be strictly scrutinized.

B. Basing a Sentence on an Arbitrary Factor Violates a Defendant's Right to Due Process and Equal Protection of the Law

The Government relies on several arguments to suggest that the sentencing scheme applicable to LSD is rational. None of the arguments withstand any level of scrutiny.

(Continued from previous page)

award of "good time" credit toward service of a sentence. *Leary v. United States*, 395 U.S. 6 (1969), *Turner v. United States*, 396 U.S. 398 (1970), and *Tot v. United States*, 319 U.S. 463 (1943), focused on evidentiary presumptions and have nothing to do with the right to fairness in sentencing.

1. The Government first argues that measuring drugs according to "street weight" rationally increases the penalty "for persons who possess large quantities of drugs, regardless of their purity." Gov't Br. 31.[9] That contention is true only when the drug is sold by weight. The weight of an LSD carrier bears no rational relationship to the only quantity – the number of doses – that is relevant to culpability. The purveyor of a single dose of LSD on a sugar cube weighing 2.27 grams will receive a longer sentence than the dealer who sells 100 doses of LSD on blotter paper with a total weight of 1.4 grams. The dealer who sells 100 doses of LSD on blotter paper will receive a longer sentence than the distributor who sells 400 doses of LSD on gelatin capsules or the wholesaler who sells 10,000 doses of LSD in liquid form. *See* Petitioner's Br. 9-11. There is simply no rational relationship between the combined weight of LSD and its carrier and the relevant measure of quantity of LSD sales.

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[9] The Government cites several cases for the proposition that the sentencing scheme is rational. *See* Gov't Br. 31 n. 15. Most of those cases deal with drugs that are sold by weight. *United States v. Mendes*, 912 F.2d 434 (10th Cir. 1990) (cocaine and heroin); *United States v. Mendoza*, 876 F.2d 639 (8th Cir. 1989) (cocaine); *United States v. Holmes*, 838 F.2d 1175 (11th Cir.), *cert. denied*, 486 U.S. 1058 (1988) (cocaine); *United States v. Klein*, 860 F.2d 1489 (9th Cir. 1988); *United States v. Hoyt*, 879 F.2d 505 (9th Cir. 1989) (cocaine); *United States v. Savinovich*, 845 F.2d 832 (9th Cir.), *cert. denied*, 488 U.S. 943 (1988) (cocaine); *United States v. Ramos*, 861 F.2d 228 (9th Cir. 1988) (cocaine). Defendant agrees that the sentencing scheme is rational when applied to a drug that is sold by weight, because increasing the total weight increases the total volume of the substance that can be marketed. That distinction is not recognized by the other cases cited by the Government, and the reasoning of those cases is therefore faulty. *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990) (LSD); *United States v. Murphy*, 899 F.2d 714 (8th Cir. 1990) (methamphetamine, relying on *Bishop*).

2. The Government argues that weighing the LSD carrier is rational because the combined weight of the LSD and its carrier "serves as a rough proxy for the size of the defendant's criminal enterprise." Gov't Br. 33. The Government is mistaken. The size of an LSD enterprise can be determined only by the number of doses possessed or sold, not by the weight or absence of the carrier holding those doses. The dealer who holds one thousand doses on blotter paper is not conducting a larger enterprise than the dealer who holds one thousand doses on gelatin capsules. In fact, since the dealers who are highest in the distribution chain are least likely to use a carrier at all, *lesser* weights may serve as a "rough proxy" for *greater* culpability.

3. The Government contends that it is "typically" true that "diluting a drug increases the trafficker's profits and allows him to distribute his wares more widely," making it rational to base a sentence on the combined weight of the drug and dilutant. Gov't Br. 32. While that may be typically true of drugs that are sold by weight. it is not true of LSD. Placing a dose of LSD on a carrier does not dilute the dose. A single dose of LSD on blotter paper is the same as a dose of LSD on a gelatin capsule, a sugar cube, or in liquid form. Placing a dose of LSD on a heavier carrier does not allow the dose to be distributed more widely than does placing the dose on a lighter carrier, or than distributing the dose in liquid form. One dose is still one dose.

4. The Government argues that, in conspiracy and attempt cases, it is "far simpler" to charge the defendant with the weight of the drug the defendant agrees to sell than it is to determine the actual weight of the unrecovered drug. Again, that reasoning is sound only if the drug is sold by weight, and has no application to conspiracies or attempts to sell LSD. In an LSD conspiracy where the drug is not recovered, neither the seller nor the buyer will know (or care about) the weight of the LSD and its carrier, because LSD is not sold by weight. The parties will know only the number of doses that the defendant agreed to sell. The defendant's sentence will then be based on the weight of the LSD alone, without reference to the carrier. *See Guidelines Manual* § 2D1.1, comment. (n.11).

Ironically, this is one of the reasons that the sentencing scheme is unconstitutionally arbitrary. As petitioners argued, sentencing LSD defendants who have sold (or agreed or attempted to sell) a known number of doses of LSD less severely because the weight of the LSD carriers is unknown creates an irrational classification for sentencing purposes that violates the right to equal protection of the law. Petitioners' Br. 42-43. The Government does not respond to that argument.

5. Petitioners also contend that it is irrational to subject dealers at the top of the distribution chain, who possess LSD in pure liquid form, to less severe sentences than low level dealers who sell small amounts on heavy carriers. The Government responds that the big fish will "not necessarily" evade the net of harsh sentencing, because they may be prosecuted for conducting a continuing criminal enterprise under 21 U.S.C. § 848, and because they may be subject to an upward departure from their Guideline range for selling a drug in an "unusually pure" form pursuant to *Guidelines Manual*, § 2D1.1, comment. (n.9). The fact that the Government *might* occasionally be able to prove the existence of a continuing criminal enterprise provides small comfort for the casual dealer who is subjected to mandatory minimum sentences for selling a few doses of LSD on a heavy carrier. Since purity is not a consideration with regard to LSD – a dose of LSD on blotter paper is just as "pure" as a dose of LSD on a gelatin capsule or a dose of LSD in liquid form in a vial – reliance on the possibility of a purity adjustment is misplaced.

6. The Government argues that the sentencing scheme has not produced "an arbitrary array of sentences." Gov't Br. 33. The government ignores the concrete examples of arbitrariness in petitioner's brief. Petitioner's Br. 40. Unjust results abound. Judge Posner points to a defendant (Dean) who sold 198 doses of LSD on blotter paper for $73.00 and received a six year sentence, a particularly lengthy term compared to those imposed on sellers of small amounts of other drugs. J.A. 78, 81 (Posner, J., dissenting). Jonathan Fuller sold 300 doses on blotter paper for $375 and was

sentenced to 95 months. Had the blotter paper weight been excluded, his guideline sentencing range would have been 12 to 18 months. *See* App. Br. 3-4, *United States v. Fuller*, No. 90-1299 (1st Cir., appeal filed Mar. 29, 1990).

In some cases, by contrast, defendants have been sentenced according to the weight of the LSD without regard to the weight of the carrier. *See, e.g., United States v. Johnson*, 888 F.2d 1255, 1256 (8th Cir. 1989) (weight of 4,300 doses of LSD found to be 430 mg.); *United States v. Mendoza-Macias*, *supra* n. 1 (excluding carrier weight).[10]

Two other cases illustrate the bizarre results that are possible under this sentencing scheme. In the first, Christopher Brown was sentenced for three separate deliveries of 500, 1,000, and 3,400 doses of LSD respectively, all on blotter paper. He was also sentenced for conspiring to deliver 10,000 doses that were never recovered or delivered. The trial court, having no actual weight for the 10,000 doses, used the "Typical Weight Per Unit Table" in *Guidelines Manual* § 2D1.1, comment. (n.11), to calculate the weight of those doses without reference to a carrier weight. Because there was a dispute about the actual weight of the LSD and its carrier, the court also used the table to calculate the weight of the 3,400 doses of LSD. Brown's sentence for the 500 and 1,000 doses, however, was based on the weight of the LSD plus its carrier. Thus, Brown's 100 month sentence was based on some, but not all, of the carriers that Brown possessed. App. Br. 2-4, 9-13, *United States v. Brown*, No. 90-1482 (6th Cir., appeal filed Apr. 16, 1990). This result defies logic.

In the second case, there was testimony that (1) five vials of liquid LSD were purchased for $325.00; (2) 100 doses of LSD on a sheet of paper were purchased for $250.00; (3)

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[10] *See also* the plea agreement in *United States v. Stavely*, No. 89-189-Cr-Orl-18 (M.D. Fla.), entered into on October 24, 1989, in which the Government agreed that defendant's sentence should be based on the actual weight of 50,000 doses of LSD, between 4 and 6.9 grams, without regard to the weight of the LSD carrier. It seems that even the Justice Department is unable to formulate a consistent position in LSD sentencing cases.

sugar cubes with drops of LSD were provided in lieu of other sheets of paper with LSD; and (4) a person took some LSD in liquid form by dropping LSD onto his eyeball. *United States v. Hanlin*, No. 90-6 Erie (W.D. Pa.), tried June 25, 1990. In this situation, it would be necessary, under the Government's view, to impose the lengthiest sentence for possession of a few sugar cubes, followed by a shorter sentence for possession of the paper, followed by a shorter sentence for possession of the pure liquid LSD. Bizarre examples such as this will only multiply as time goes on.

Contrary to the Government's argument, the petitioners do not rely on "curious hypothetical cases," nor do they attempt to assert the rights of dealers who use exceptionally heavy carriers. Rather, petitioners have demonstrated that the law classifies all LSD dealers by reference to an arbitrary factor. Dealers who use heavier blotter paper risk longer sentences than dealers who use lighter blotter paper.[11] Dealers who use blotter paper will be sentenced more harshly than equally culpable dealers who use gelatin capsules. As Judge Posner pointed out, the petitioners are entitled to compare their own situations to those of equally culpable persons who are classified differently, and treated more favorably, by the law. Comparisons to persons who are treated less favorably, such as sugar cube dealers, are also "relevant to exploring the logic behind the scheme of punishment – and show that there is none." J.A. 85 (Posner, J., dissenting).

7. The Government responds to evidence of arbitrariness by suggesting that defendants choose their own poison when they decide to use a heavier carrier. That argument overlooks a crucial failing of arbitrary statutes: they provide no notice of the proscribed conduct.[12] It is unlikely that LSD

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[11] The survey of blotter paper weights in petitioner's brief demonstrates that a single square of paper may weigh from 5.5 mg. to 15.4 mg. Petitioner's Br. 10 n.7.

[12] This lack of notice is one of the policies upon which the rule of lenity is founded. *United States v. Bass*, 404 U.S. 336, 348 (1971).

dealers reading the law knew that they would be subject to more severe sentences if they used heavier carriers. If the Government's interpretation is adopted, however, knowledgeable dealers will simply resort to carriers that are not intended to be ingested, or will market the LSD and the carriers separately, leaving it to the ultimate user or to a small volume street dealer to adhere the LSD to its carrier. The argument that the Government may sentence offenders arbitrarily because offenders choose their own carriers simply fails to contend with the constitutional inadequacies of the law or the realities of the marketplace.

8. The Government also seeks to compare this sentencing scheme to a hypothetical scheme in which a determinate sentence is imposed for distributing *any* quantity of LSD in any form. Gov't Br. 35. The comparison is not fruitful, because such a sentencing scheme would not base sentences upon an arbitrary factor. The irrational results compelled by the current sentencing scheme simply cannot be justified in a constitutional system that requires deprivations of liberty to be undertaken in a rational manner.

None of the Government's arguments confront the central constitutional issue raised in this appeal. Two LSD distributors with identical criminal records selling the same number of doses of LSD of identical purity will be sentenced differently if they use carriers of different weights. It would be hard to imagine a way to violate the right to equal protection of the law that is more intuitively unjust than this. If basing sentences upon the arbitrary weight of an LSD carrier does not violate due process, then the due process guarantee against arbitrary and irrational governmental action is meaningless.

The LSD sentencing scheme cannot survive the strict scrutiny it warrants. Even if the right to be free from arbitrary sentencing were not fundamental, however, no rational explanation could be posited to save the scheme from its constitutional infirmity.

CONCLUSION

For the reasons stated, the judgments below should be reversed and remanded for new sentencing proceedings. The lower court should be directed to sentence the defendants without regard to the ,weight of the blotter paper that carried the LSD.

T. CHRISTOPHER KELLY
(Appointed By This Court)
121 South Hamilton Street
Madison, Wisconsin 53703
(608) 255-6607

Counsel for Petitioners

FOR ARGUMENT

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No. 90-5744

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICHARD CHAPMAN, et. al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, et. al.,

Respondents

On Writ of Certiorari to the Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF RESPONDENT, STANLEY MARSHALL, Suggesting Reversal

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DONALD THOMAS BERGERSON
2431 Fillmore Street
San Francisco, California,
94115

Telephone: (415) 621-8149

Attorney for Respondent,
STANLEY MARSHALL

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No. 90-5744

SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICHARD CHAPMAN, et. al.,
vs.
THE UNITED STATES OF AMERICA

REPLY BRIEF OF RESPONDENT MARSHALL
Urging Reversal

SUMMARY OF ARGUMENT

I

(A)

The words of the statute do not clearly indicate that carrier media should be regarded as "mixtures or substances containing L.S.D." for sentencing purposes. None of the ordinary usages of the words "mixture or substance" applies to such carrier media. As such, the statute is genuinely ambiguous, and the Government's claim that the "rule of lenity" does not apply in this case is meritless.

Nor does the Government achieve success with its several specific arguments in favor of construing "mixture or sub-

stance" to include carrier media.

(1) The footnote to the "Typical Weight Per Dose" table in the Guidelines stating that the dosage weight of pure L.S.D. is less than the weight of a substance or mixture containing it is "subsequent legislative history," a poor guide to construing a statute. Anyway, the footnote is no less ambiguous than the statute, and also covers other drugs which are not marketed on carrier media.

(2) Contrary to the Government's assertion, carrier media are not equivalent to cutting agents since they neither multiply the number of doses nor, themselves, divide the drug into doses.

(3) The Government's argument that carrier media are "substances or mixtures" because they can be ingested is faulty. "Ingestibility" is not mentioned (or implicit) in the statutory language. The "ingestion test" is useless because it excludes things which are "mixtures or substances."

(4) The "unanimity" of appellate opinion construing carriers as "mixtures or substances containing L.S.D." is a deceptive one, as discussed in the opening briefs.

(B)

Contrary to the Government's claim, the aims of Congress in passing § 841(b),--focusing enforcement resources on big drug dealers and assuring uniform sentencing,--would be frustrated were carriers deemed "mixtures or substances containing L.S.D."

II

Notwithstanding the Government's arguments, carrier-weight-based sentencing remains irrational. The Government has articulated no genuine rational reasons for carrier-weight-based sentencing; the Government only offers "excuses" to show that, while odd, it is not too odd. Further, even the "excuses" fail.

(1) That dealers can "choose" their carrier does not reveal a rational reason

for basing sentencing on carrier-weight.

(2) There is no evidence that blotter paper is the "norm" these days. Even if it were the norm, carrier-weight-based sentencing produces a bizarre sentencing array within blotter paper cases.

(3) Blotter paper is not a "proxy" for the size of an L.S.D. trafficking enterprise. Not only does carrier-weight-based sentencing produce bloated sentences across the board, but carrier-weight increases at a differential rate (relative to the Guidelines) from actual L.S.D. Hence, the relationship between carrier-weight and the amount of drug being trafficked is a stochastic one.

(4) Although Congress might have fixed a flat sentence for dealing any amount of L.S.D., it did not do so. This mere possibility does not make carrier-weight-based sentencing rational.

(5) Carrier-weight is not "street weight," hence is not a rational measure

of the amount of drug actually trafficked.

(6) Carrier-weight does not measure increased dosage achieved by dilution, since L.S.D. is not sold in diluted form.

(7) Although a "Typical Weight Per Dose" Table may be necessary (as the Government argues), disparity in it is not,--and any disparity illustrates rather than disproves petitioner's claim that the sentencing scheme is irrational.

(8), (9) Arguments that the Government can evade the inequities of carrier-weight-based sentencing "departures" is not more than a claim that the system can be made rational to the extent it is disregarded.

III

The Government misconstrues Marshall's Eighth Amendment claim. Marshall did not base his claim on "absolute" sentence length. Rather, his sentence is both long ("cruel") and based on an adventitious factor unrelated to culpability ("unusual").

ARGUMENT

I

THE GOVERNMENT HAS NOT SHOWN THAT CONGRESS INTENDED TO INCLUDE CARRIER MEDIA IN THE WEIGHT OF L.S.D. FOR SENTENCING PURPOSES

Introduction

The parties agree that in 1986 Congress ordained that, in drug cases, the sentence be calculated on the basis not of the weight of the pure drug, but on the weight of any "substance or mixture containing" the drug.[1/] The parties disagree, however, on whether, in L.S.D. cases, the phrase "mixture or substance" refers to the carrier medium, here paper, on which the L.S.D. is placed for purposes of distribution.

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1. The Government claims, (Govt. Br. at 17), that "courts of appeals have consistentely rejected the argument that a sentence should rest on the net weight of the pure controlled substance." The Government cannot mean that sentences can never be based on the weight of a pure sample. Were this so, trafficking in pure drugs not be penalized.

(A)
The Government Has Not
Overcome the "Lenity"
(And Other Statutory Construction)
Arguments in this Case

Relying on the "rule of lenity" (and cognate principles of statutory construction) Marshall and Chapman contend that carrier weight should not be included in the sentencing calculus. (Marshall Br. at 28, 65-66, Chapman Br. at 27-28).

Quoting general language from several cases, the Government argues these rules are inapplicable here. (Govt. Br. 22, 23).

This Court will not profit from a volley of contradictory generalizations about when lenity applies. Nor need such a volley be launched, since the principle is simple: while the rule of lenity is not triggered merely because a statute fails to iterate each instance of misconduct to which it applies, it is invoked when there is a reasonable and lingering doubt as to what the statutory

language means in relation to a given class of conduct. Moskal v. United States 111 S.Ct. 461, 465 (1990).

In his brief, Marshall contended that "lenity" applies because the words "mixture" and "substance,"--words already problematic because they have different, (and in the case of "substance," dichotomous), definitions,--are insoluably ambiguous here.

"Substance" (in the sense that it means any form of corporeal matter, however alloyed) might describe a physical vessel which "contains" L.S.D., but settled caselaw excludes the weight of such vessels for sentencing purposes.[2/] (Marshall Br. at 31-32). On the other hand, when "substance" is used to mean a particular form of matter, (the "essence" of a thing), it does not describe so diverse an assemblage as blotter-paper-

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2. The Court of Appeals ruled that vessels ought not to be weighed. (J.A. 44). The Government agrees. (Resp. Br. at 21).

plus-L.S.D.. (Marshall Br. at 34-35).

"Mixture" might describe a blend of L.S.D. with other chemicals,[2a/] but this usgage is meaningless when applied to L.S.D. plus-paper. An alternative meaning of "mixture,"-- reciporocal blending,-- does not describe L.S.D. on paper either, because the blending of L.S.D. and paper is not reciporocal. (Marshall Br. at 36-37; see, Chapman Br. at 14-21).

Posed against these claims, the Government's reliance on cases such as Moskal v. United States 111 S.Ct. 461 (1990) and United States v. Monsanto 109 S.Ct. 2657 (1990), [(Govt. Br. at 18-23)],

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2a.In his brief, Marshall described L.S.D. tartrate as such a mixture, (Marshall Br. at 38-39, 40-42, 53, fn. 36). "Mixture" might also describe "cocktails" made up of L.S.D. mixed with other drugs. E.g., Blum, Handbook of Abusable Drugs (1979) at p. 563; Hofmann and Hofmann, Handbook on Drug Abuse: The Biological Aspects (1975), at pp. 55, 152, 154. Senator Hawkins made references to these "mixtures" of L.S.D. in the Senate during 1986. (Marshall Br. at 53, fn. 36; Amicus Br. at 6, fn. 7).

is misplaced. Those cases involved claims that the Government had failed to iterate specific types of conduct covered by the statute. Here, by contrast, the question is whether the Government can show (beyond reasonable doubt, [Moskal v. United States, supra, 111 S.Ct. at 465]), that statutory words are clear in the first place.[3/]

The Government has failed to show statutory clarity. Indeed, some of the arguments advanced by it further muddy the issue. Marshall considers the Government's arguments in sequence.

1. The Government first argues that the "Typical Weight Per Unit" table states that for drugs marked on the table with an asterisk, including L.S.D., "the weight per unit shown is the weight of the actual

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3. As such, contrary to the Government's claim, (Govt. Br. at 8), Chapman and Marshall are not trying "to fashion a special exception" to a clearly-worded statute, (e.g., Monsanto), but are merely arguing that the statute is not clear.

controlled substance, and not generally the weight of the mixture or substance containing the controlled substance." (Govt. Br. at 17, Govt. App. 4a).

A threshold problem is presented by the fact that the footnote was added to the sentencing table after petitioners (and Marshall) were sentenced,-- perhaps even in response to cases such as the present one. Reliance on the subsequently added language of the footnote is recrourse to precisely the sort of "subsequent legislative history" against which justice Scalia so aptly warned in Sullivan v. Finkelstein 110 S.Ct. 2658, 2667 (1990) (Scalia, J.. concurring).

Apart from this procedural problem, the footnote is not very useful to the Government's position. The table places asterisks beside drugs, (P.C.P., M.D.A., psilocin, psilocybin, and S.T.P.), for

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4. The footnote was added in 55 F.Reg. 19197 (May 8, 1990).

which the record provides no evidence of marketing by way of carrier media.[5] For P.C.P., Congress has explicitly set out a penalty based on the weight of the pure drug. E.g., 21 U.S.C. 841(b)(1)(A)(iv). Moreover. the table does not set an asterisk next to mescaline, which, although often sold pure, is also sometimes marketed in a carrier.[6]

At any rate, that the asterisk-marked drugs might be sold as a "mixture or substance" rather than in pure form does not prove that the "mixture or substance" in question is the sort of carrier media at issue here. The footnote provides no evidence that Congress intended the words "mixture or substance containing" to refer

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5. Indeed, psilocybin appears to commonly be sold pure. See, Hofmann and Hofmann, Handbook, supra, page 175.

6. E.g., Blum, Handbook, supra, p. 545, (mescaline sold either as pure powder or in gelatin capsules); see, e.g., United States v. Dolan 544 F.2d 1219, 1223 (4 Cir. 1976) (mescaline tablets). (Dolan is ambiguous as to precisely what was in the tablets, but they were marketed as mescaline).

to carrier media.[7/]

2. In an argument based on the mechanics of L.S.D. distribution, the Government claims that "L.S.D. "carriers" serve precisely the same function as the more familiar "cutting agents" which are typically used with other drugs," since carriers enable a dealer to distribute the drug in large quantities ...." (Govt. Br. at 20). Since, argues the Government, "cutting agents" are "mixtures or substances containing" drugs, blotter paper is a "mixture or substance" as well.

The analogy of carrier media in L.S.D. cases to "cut," however, fails.

The function of a "cutting agent" is to expand the apparent amount of a con-

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7. In a related argument, the Government states that the Drug Quantity Table specifies that, for sentencing purposes, "mixture or substance" is to have the same meaning in the guidelines as it does under the relevant statute. (Govt. Br. at 15-16). This argument begs the question; the meaning of the phrase is precisely that which this Court is called upon to determine.

trolled substance to allow for a greater number of sales. (Govt. Br. at 32). Since L.S.D. is sold by the dose, carrier media do not perform this function. (Chapman Br. at 17). Calling carriers "cutting agents" distorts the meaning of the phrase "cutting agent," as well as mischaracterizes the use of carriers in L.S.D. cases.

Not only does the analogy of carrier media to "cut" fail in terms of "function," but it fails also in terms of "form." A "cut" "divide[s] a small volume of a highly potent drug into a large number of easily separable units containing a single dose, something that could not easily be done by distributing the drug in pure form, straight from the bottle." (Govt. Br. at 19). Actually, what makes it possible to "divide a small volume of highly potent drug" is whatever dilutant in which the L.S.D. is suspended prior to being mounted on the carrier, e.g., an

alcohol suspension. (See, description at J.A. 39-40). The blotter-paper (or sugar or gel) does not serve the function of dividing up the drug.

On the other hand, the analogy to packaging materials, (which the Government concedes are not to be weighed, even in L.S.D. cases, (Govt. Br. at 21)), survives, and governs in this case. Carrier media serve the same function as do a glasseine envelopes or bindles. According to the description given (perhaps erroneously) by the Court of Appeal, (J.A. at 44-45), it is theoretically possible to pick up a grain of L.S.D. with a tiny tweezers and stuff it in between the fibers of the paper (or into the matrix of a gel or the grains of a sugar cube). How this would differ from stuffing cocaine into a glasseine envelope is too gossamer a distinction to essay.

Concededly, concentrations of some "cut"

drugs may be low in individual cases. E.g., United States v. Buggs 904 F.2d 1070 (7 Cir., 1990). But that blotter paper carries L.S.D. in similarly low concentrations, (Govt. Br. at 27-28), does not turn something which is not a "cut" into a "cut." When a drug is cut, "the mixture is then sold as a heavily diluted form of the drug." (Govt. Br. at 27). Neither Marshall nor Chapman sold his L.S.D. as "diluted;" each sold "pure" L.S.D. packaged on a carrier for delivery to the consumer.

3. Respondent next argues that unlike glasseine envelopes (or other vessels), "the blotter paper itself can be and is ingested with the drug[8/] much the same as any dilutant or cutting agent would be

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8. The Government's own expert at Marshall's bench trial testified that it was immaterial whether the carrier media was ingested or not. (Tr. 49). Indeed, in a different part of its brief, the Government agreed that the paper need not, itself, be ingested. "Users can ... lick the L.S.D. off the paper." (Govt. Br. at 4).

ingested." (Govt. Br. at 20). By contrast. bottles and cars are not "substances containing" drugs "because they are not ingested along with the drug. When L.S.D. is carried in a jar, the L.S.D. and the jar are not a "mixture or substance" any more than cocaine and tinfoil are a mixture or substance ...." (Govt. Br. at 21). This argument is faulty in two ways.

First, if "ingestion" is the key to the definition of "mixture or substance," cocaine (as "cut"), would not be a "mixture or substance containing cocaine."[9/] The "dictionary" definition of "ingest," is to "eat." Websters Third New International Dictionary (1986), page 1186. One

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9. The "ingestion" test also spoils the Government's reliance on the "dictionary" definition of "mixture" as "two or more components ... that however thoroughly commingled are regarded as retaining a separate existence." (Govt. Br. at 18). If L.S.D.-plus-paper, gel, or sugar is purchased as a single item, swallowed whole, and digested intact, the paper and the drug cannot each be "regarded as retaining a separate existence."

does not "eat" cocaine; one absorbs it through the mucosa of the lungs.

Perhaps, then, a larger (non-dictionary) definition of "ingest" is required to make the Government's point; maybe "ingest" should be redefined as "take into the body." But under this definition, the needle on a heroin syringe would be "ingested," hence would be a "mixture or substance containing heroin,"--a palpably absurd result. But calling a needle a "mixture or substance containing heroin" is no more absurd than is calling blotter paper a "mixture or substance containing L.S.D."[10/]

Second, anchoring the definition of "mixture or substance" on "ingestibility" will warp the results in two other kinds of drug cases.

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10. Indeed, the analogy is very close. The needle is extracted from the arm after serving its purpose; similarly, the fiberous paper is not digested, but is extracted, (as excrement), from the gut of the L.S.D. consumer days later.

In one such kind of case, ingestible material is not weighed along with the drug. For example, when some drugs are sold in gelatin, the capsules are not weighed. (Marshall Br. at 31; Tr. at 50, 56).

Conversely, in methamphetamine cases, non-ingestible material is weighed. According to the Court in United States v. Butler 895 F.2d 1016, (5 Cir., 1989), cert. den. 111 S.Ct. 82 (1990); cf., United States v. Baker 883 F.2d 13, 15, cert. den., 110 S.Ct. 517 (5 Cir., 1989), manufacturing-effluent containing a fraction of methamphetamine is a "substance containing methamphetamine," even though it is not intended for ingestion. Under the Government's own "ingestion test," methamphetamine "wash" ought not to be regarded be a "mixture or substance containing" methamphetamine,-- an absurd result both in practical terms and according to the Government's own position in Butler.

That the Government was forced to redefine "substance containing" as "ingestable,"--a construction which finds no basis in the actual statutory language,--is revelatory of how far-fetched the Government's construction of the statute has turned out to be.

4. The Government cites to thus-far unanimous appellate opinion which holds that L.S.D.-plus-carrier is either a "mixture," [J.A. 44-45], or a "substance," [United States v. Daly 883 F.2d 883 F.2d 313, 317 (4 Cir., 1989), cert. den. 110 S.Ct. 2622 (1990); United States v. Bishop 894 F.2d 981 (8 Cir., 1990)]. (Govt. Br. at 11, 19-20, 23, 26, fn. 11, cf., 18).

As Marshall pointed out in his opening brief, however, (Marshall Br. at 30-45), the real purport of these decisions is that the courts have split.--(some courts regarding the paper as a "mixture" but not a "substance," and vice

versa),--and that the split accrues from dichotomous definitions for the key words "mixture" and "substance."

That Courts which purport to find the statutory language unambiguous disagree about the meaning of key words in that statutory language shows that the semantic bedrock of the statute is shakey. It is troubling,--and telling,--that the Government has not answered Marshall's argument.

(B)
The Government Has Not
Shown That The Legislative
History Supports Its Position

Citing extensivly to the history of Federal antidrug legislation, the Government argues that, by 1986, "Congress knew how to distinguish between the weight of a pure drug and the weight of a "mixture or substance" containing some quantity of the drug." (Govt. Br. at 12).

It does not follow from this, of course, that blotter paper is a "mixture

or substance" within the meaning of the statute. Nor does United States v. McGeehan 824 F.2d 677, 681 (8 Cir., 1987), cert. den., 484 U.S. 1061 (1988),--decided a year after Congress enacted the relevant language,--provide proof of what Congress meant to say in its previous session.[11/]

What is relevant in the legislative history is that Congress enacted the anti-drug act of 1986 in pari-materia with that provision of the determinate sentence act which called for uniformity in sentencing for similar crimes. 18 U.S.C. 3553(a)(6); see, 21 U.S.C. 991(b)(1)(B). In his opening brief, Marshall has shown how weighing carrier media in L.S.D. cases will produce grossly lengthier sentences for L.S.D. sales than for the sale of any

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11. The only inference which the McGeehan Court logically drew was that prior to 1986, Congress did not intend to weigh blotter paper; it does not follow from this, that Congress did intend to weigh blotter paper after 1986.

other drug, (Marshall Br. at 26-27), and produces disproportionate results within the range of sentencing in L.S.D. cases. (Marshall Br. 25-26, 62). The Government does not discuss this aspect of the history,--a significant omission.

Nor does the Government discuss that the reason advanced by Congress for enacting the "mixture or substance" provisions of the anti-drug act was to target scarce law enforcement resources at (1) kingpins and (2) mid-level managers. (See, H.R. Rep. No. 845, 99 Cong. 2d. Sess., Pt. 1, at 11-12; 132 Cong. Rec. S. 14270-14271 (9/30/1986); Marshall Br. at 46-47, 49-50). In his brief, Marshall has argued that only if carrier media are not weighed in L.S.D. cases will sentencing of L.S.D. offenders place mid-tier dealers such as Marshall in the proper sentencing range (as opposed to in the range reserved for "kingpins" dealing millions of doses).

(Marshall Br. at 50-51). Moreover, the reason for the three-tier approach of amended-21 U.S.C. 841(b), is to focus scarce law-enforcement resources where they are really needed,--primarily on "kingpins" and then on "managers of the retail traffic." H.R. No. 99-845, supra. at 11. Marshall has argued that carrier-weight-based sentencing will frustrate these goals by wasting law enforcement resources on mid-tier dealers (pretending they are "kingpins" when they are not), and by making the L.S.D. trade harder for law enforcement officers to detect and disrupt as traffickers restructure their operations without diminishing profit. (Marshall Br. at 72-74). These arguments remain unanswered by the Government's brief.[12/]

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12. The Government faults Chapman for referring to correspondence between the Sentencing Commission and Senator Biden to show the ambiguity of the statute. (Govt. Br. at 23-26). The Government misconstrues the point of the

[cont. on page. 25]

Conclusion to Part I

Congress in 1986 intended that the weight of impure drug samples would be the basis for sentencing in Federal narcotics cases. It does not follow, however, that Congress intended to weigh inert carriers such as gelatin, sugar, or paper to determine the sample-weight in L.S.D. cases. To the contrary, everything augers against such a construction of the statute.

II
EVEN IF CONGRESS INTENDED THAT CARRIER MEDIA BE WEIGHED IN L.S.D. CASES, THE RESULT WOULD BE IRRATIONAL

Chapman and Marshall have argued, (Chapman Br. at 38-44; Marshall Br. at 66-81), that the carrier-weight-based

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[fn. 12, cont. from page 24] reference. Wilkins' confusion is not an aid to statutory interpretation, but rather show the statutory language is too unclear to be "interpreted" at all, and thus supports invocation of the rule of lenity.

sentencing scheme is irrational.

None of the arguments advanced by the Government in response have merit.

One comment might be made at outset. Under the "rational basis" test, legislative classifications must be "rationally related to a legitimate governmental interest." **Department of Agriculture v. Moreno** 413 U.S. 528, 533 (1973); **Baxtrom v. Herald** 383 U.S. 107 (1966). Disturbingly, the Government has articulated no such interest which might be served by carrier-weight-based sentencing. Rather, all of the Government's contentions seem to be "excuses" as to why such sentencing, if odd, is not too odd.

As appears below, even these "excuses" lack merit.

1. The Government contends the trafficker selects the carrier, hence has control over any irrationality in the sentencing scheme. (Govt. Br. at 33).

Although Marshall and Chapman indeed "chose" to market their L.S.D. on paper, it is clear that they did not do so with a subjective awareness of the consequences of this choice in terms of carrier-weight-based sentencing. That Chapman and Marshall voluntarily did something of no apparent significance to them does not make a later, arbitrary interpreation of their conduct a rational one. Marshall and Chapman have argued in their briefs that should carrier-weight-based sentencing ultimately prevail, traffickers will modify their activities to avoid the new statutory reach,--with disasterous consequences for the goals of the anti-drug legislation. (Marshall Br. at 72-74). In this hypothetical future, "choosing" carrier media might have a significance. For now, it proves nothing about the rationality of the statutory scheme.

2. The Government states that since

"blotter paper seems to be the norm these days," (Govt. Br. at 34-35, citing J.A. 61),[13] neither Chapman nor Marshall has standing to complain of any sentence which a trafficker might receive for using a heavier carrier, (Govt. Br. at 33), and they have not, in any event, shown that sentencing in L.S.D. cases has proven arbitrary.

Contrary to the Government's assertion, there is no evidence that "blotter paper seems to be the norm these days." The defendant in United States v. McGeehan, supra, 824 F.2d at 681 trafficked in L.S.D. on gelatin capsules; see, also, United States v. Dolan, supra, 524 F.2d

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13. The Government implies that references to carriers other than blotter paper are "curious hypothetical examples," (Govt. Br. at 34), which prove nothing in the real world. In light of the Government's own concession that the act requires weighing a sugar cube for sentencing purposes, (Govt. Br. at 21), (triggering a 5 year minimum sentence for a single dose), it is hard to fault petitioners for fanciful hypotheticals.

1219 (L.S.D. and other drugs on tablets).

Even if blotter paper were the norm, carrier-weight-based sentencing would still be irrational. Although blotter paper is common, gelatin is not an uncommon carrier. Had Marshall sold his 11751 doses, (J.A. 39). on gelatin, he would have sold an aggregate of 26.43 grams. (See, McGeehan, supra, 824 F.2d at 680.). His base offense level would have been 32 on the "Drug Table," (U.S.S.G. Table 2D1.1), for which a sentence of as little as ten years (as opposed to Marshall's twenty) is possible.[14/]

Even within the narrow ambit of blotter paper trafficking, itself, Chapman and Marshall can point to grotesque results in actual reported cases. In dissent, Judge Posner mentioned Rose, [United States v.

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14. Even with his upward-adjustment of two levels, (Govt. Br. at 38, fn. 18), Marshall would have been elibigible for a sentence of as little as 151 months,--a reduction by 1/3 of what he received.

Rose 881 F.2d 386 (7 Cir., 1989)], who sold less than half as many doses as Chapman, yet who (in terms of the Guidelines), was eligible for a longer sentence. (J.A. 78, Posner, J.. dissenting).[15/] In his brief, Marshall has pointed out that had he traded blotter paper with Chapman and then each had sold the same number of doses as were, in fact, respectively sold, the sentence results in each case would have differed radically.[16/]

3. The foregoing belies the Government's

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15. 7.2 grams of L.S.D. on Table 2D1.1 is level 30, which carries a sentence range of 97-121 months. The base range for Chapman's 5.7 grams of paper is 78-97 months. In actual fact, Rose was not sentenced under the Guidelines.

16. See, J.A. 41, fn. 1. Had Marshall used Chapman's paper (at .0057 gm. per dose), he would have dealt 67 grams of "L.S.D." for a base offense level of 34 (instead of 36). Had Chapman dealt his 1000 doses on Marshall's .00964 gm. paper, he would have dealt 9.64 grams of L.S.D., for a base offense level of 30 (instead of 28) Forty more doses, and Chapman would have crossed-over into level 32, nearly doubling the sentence-range for which he actually was liable.

assertion that weighing the carrier medium "serves as a rough proxy for the size of the defendant's criminal enterprise." (Govt. Br. at 33).

The extreme heaviness of paper relative to the weight of pure L.S.D. would make this "proxy" a rough one, indeed, even if paper-weight increased relative to the Guidelines at a rate correlate to the weight-increase of the L.S.D. on the paper.

In fact, however, paper-weight increases at a differential rate relative to the guidelines than does the L.S.D., itself, thus warping any correlation between paper-weight and the size of the enterprise. For example, had Chapman doubled the volume of L.S.D. he sold, he would have stepped up two notches on the sentence table based on the weight of the drug, itself, but four notches based on the weight of the paper. Although the

discrepancy ultimately evens out (somewhat) at higher levels,[17] the carrier is not a "rough proxy" for the size of a trafficking operation in many cases.[18]

Even when, under rare circumstances, the "increase discrepancy" vanishes entirely, paper-weight is not a "rough proxy" for the size of the enterprise because any match-up between paper-weight and enterprise-size is purely coincidental. The true size of an L.S.D. "enterprise" is the number of doses which a trafficker dispenses (since this is how the enterprise markets its

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17. Had Chapman multiplied his dealing sixfold, he would have advanced four spots on the sentencing table for the pure drug, and six for the paper. While this is still a differential increase, the difference is somewhat less than that which occurs at lower levels.

18. Dean put roughly 200 doses on roughly a gram of paper. (J.A. 77, Posner, J., dissenting). Assuming the doses weighed .05 mg. each, each sheet contained 10 mg. of L.S.D. One would have to multiply the L.S.D. 5, 10, and 20 times to move-up two, four, or six steps on the guidelines; one would only have to multiply the paper 4, 7, and 10 times to get the same increases.

wares), and the foregoing actual cases show that the weight of the carrier bears a stochastic relationship to the number of doses sold by any given individual.

4. The Government argues that since Congress might have passed a fixed sentencing statute punishing all trafficking (regardless of amount) with a twenty year sentence, Chapman and Marshall have no reason to complain. (Govt. Br. at 33, 35).

Although "Congress could have written the statute to produce this result," [McElroy v. United States 455 U.S. 642, 656 (1982)(emph. added)], "[t]he short answer is that Congress did not write the statute that way." Russello v. United States 464 U.S. 16, 23 (1983). Had Congress written such a statute, it would be Draconian but not arbitrary. As presently written (according to the Government), the sentencing scheme is not merely harsh, but arbitrary.

A hypothetical suggested by the Government's own brief illustrates the point. The Government has illustrated the potency of L.S.D. by arguing that a mere three ounces of it could intoxicate every person in Glasgow, Scotland. (Govt. Br. at 19-20, fn. 10). According to the 1989 World Almanac, (p. 729), Glasgow has a population of 751,000. Marshall was given a twenty year sentence, (J.A. 39), for selling 113 grams, (four ounces), of "L.S.D.." But his L.S.D. was only enough to drug a metropolis ranging in size between Avacado Heights, California and Eunice, Louisiana.[19] As for the fiend who poisoned Glasgow, he sold only about 75 grams (U.S.S.G. level 34). His sentence is less than Marshall's.

But one need not result to fanciful hypotheticals. A study of the actual

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19. The respective populations are: 11741 (Almanac, supra, at p. 545), and 12479 (p. 554).

prosecutions cited by Judge Posner, (J.A. 77-78),--or, for that matter, a comparison between petitioners Chapman and Marshall's paper-weights in this very case,--shows that carrier-weight irrationally distinguishes between L.S.D. offenders, even as it rockets all L.S.D. sentences to stratospheric heights in comparison with the sentences imposed for dealing other drugs.

5. The Government argues that it is rational to measure the quantity of drugs according to their "street weight," and that "every court of appeals that has addressed the issue has [so] held." (Govt. Br. at 31). But this observation is true only if a drug has a "street weight." L.S.D. does not have a "street weight" in the sense to which the Government refers. Unlike other drugs such as heroin or cocaine, L.S.D. is not sold by the "street weight" of the mixture or substance containing it, (Marshall Br. at

21), but rather, is sold by the dose (J.A. at 12; Chapman Br. at 6; Govt. Br. at 4).

6. The Government argues that "up to the point that the market will allow, diluting a drug increases the trafficker's profits and allows him to distribute his wares more widely." (Govt. Br. at 32). This, apparently, justifies increased sentencing for diluted drugs. As both Chapman and Marshall have argued, however, (Chapman Br. at 16; Marshall Br. at 55-56), placing L.S.D. on gel, sugar, or paper for distribution is not the same as "diluting" it. The drug is still dealt in "pure" form, albeit mounted on a carrier. Indeed, in these cases, the doses dealt were more potent than the average dose set by the Typical Weight Per Unit table.[20/] Moreover. placing L.S.D. on any specific carrier bears no relationship to the

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20. Compare Table, supra, page 7, (50 micrograms per typical dose) with J.A. at 41, fn. 1: Marshall's L.S.D. was 57 micrograms per dose and Chapman's was even purer.

to the profits of the dealer. There is surely no evidence here that profits increase in proportion to the weight of the carrier. The rationale for increasing punishment for "cutting" a drug is that such "cutting" increases the number of available doses. United States v. Holmes 838 F.2d 1175, 1177-1178, cert. den., 486 U.S. 1058 (11 Cir., 1989). As indicated, placing a gram of L.S.D. on blotter paper does not increase the number of doses; it just portions-off the gram into the number of doses latent in it from the outset.

7. Answering claims that the irrationality of the carrier-weight-based scheme is illustrated by the fact that the Typical Weight Per Dose table excludes the weight of the carrier, the Government answers that use of such a table is necessary in certain kinds of cases. (Govt. Br. at 32). While this is arguably a valid premise, it does not explain why

the dose-weights listed on the "table" are so disparate from the weights involved in the instant cases. Nor does it answer to the constitutional objection that this disparity is irrational.

8. The Government next argues that various provisions of both the anti-drug laws and the Sentencing Guidelines provide sufficient flexibility to avoid unfair results in L.S.D. cases. Specifically, the Governemnt argues that major drug traffickers can be prosecuted under the "continuing criminal enterprise" statute, [21 U.S.C. 848], (Govt. Br. at 32), and that a judge can depart upward from the Guildines for cases involving pure L.S.D. (or for the status of a given dealer as a "leader/organizer"). (Govt. Br. at 32-33).

The "C.C.E." claim can be readily rebutted. One element in a C.C.E. prosecution is proof that the entepreneurs acted in concert with five or more other

persons in a management role. 21 U.S.C. 848(d)(2)(A). Neither Chapman, (J.A. 4-8) nor Marshall were involved in such big enterprises; pure or not, their L.S.D. trafficking could not give rise to a C.C.E. prosecution, and the Government has offered no evidence that ordinary L.S.D. "rings" are big enough to trigger C.C.E. prosecutions in many, if any, other cases. Indeed, that neither Marshall's nor Chapman's enterprise was big enough to fall under the C.C.E. statute underscores that they are not the "big time" dealers that their lengthy sentences would imply.

The "upward departure" argument is also without merit. If "carrier cases" are sentenced in the Draconian manner championed by the Government and all other cases are "upwardly adjusted," no one would get the statutory penalty for trafficking in L.S.D..

Nor has the Government offered

indication that upward departures of the sort suggested by it have ever been tried.[21] That someone dealing in pure L.S.D. might, at some future time, face harsh punishment provides no solace to persons serving "prison sentences ex-ceptionally harsh by the standards of the modern Western world." (J.A. 81, Posner, J., dissenting).

9. In a complementary argument, the Government suggests that defendants similar to Chapman can receive "downward departures" and other adjustments.[22] (Govt. Br. at 36-37). The Government has not

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21. It is disquieting that the Government draws on hypothetical "escape mechanisms" to rationalize the sentencing scheme when the defense was precluded, on appeal, from pointing to hypothetical disparities to illustrate its inequities. (J.A. at 51).

22. The Government states that all three petitioners here "benefitted from these departure provisions." (Govt. Br. at 37). The sentence of imprisonment imposed on Schoenecker, however, reveals "a term at the lower end of the guideline range," (J.A. 26), rather than a downward departure. Nor did Marshall receive a "downward departure." (Govt. Br. at 38, fn. 18).

explained how "downward departures" can lend rationality to carrier-weight-based sentencing. The argument seems, rather, to be that downward departures may palliate on shocking occasions. Essentially, the Government is arguing that the sentencing scheme at issue here is rational to the degree that courts choose to disregard it.

Conclusion to Part II

The Government has offered no reason for carrier-weight-based sentencing, and its various disclaimers that the scheme is unfair are not persuasive.

III
THE GOVERNMENT HAS NOT REBUTTED MARSHALL'S CRUEL AND UNUSUAL PUNISHMENT ARGUMENT

In a footnote, (Govt. Br. 30, at fn. 13), the Government argues that Marshall's forty-year sentence is not excessive in

light of Hutto v. Davis 454 U.S. 370 (1982). This argument misses the point of Marshall's Eighth Amendment argument. (Marshall Br. at 91-97).

Marshall never complained that a twenty year sentence for drug dealing was, of itself, violative of the prohibition against cruel and unusual punishments. A uniformly-applied twenty year sentence for L.S.D. trafficking at Marshall's level would pass constitutional muster because however "cruel,"[23] it would not be "unusual." On the other hand, a capriciously-applied statute which punishes some, but not others, on the basis of an adventitious factor wholly unrelated to actual culpability, would be not only cruel but unusual as well, and hence would run afoul of the Eighth Amendment. Carrier-weight is wholly unrelated to crimin-

23. Even the Seventh Circuit majority found the sentence to be "harsh." (J.A. 62; see, J.A. 81).

ality. A person who sells the same number of doses of L.S.D. on a heavier weight of blotter-paper than another is not a worse criminal. Yet, under carrier-weight-based sentencing, he receives a harsher penalty. When, as in Marshall's case, the punishment is objectively long, such punishment is clearly cruel and unusual within the meaning of the Eighth Amendment.[24]

CONCLUSION

In the clear light of a real world, carrier-weight-based sentencing is absurd and unfair. L.S.D. is not marketed in terms of the weight of the carrier on which it is mounted. Weighing that carrier as the basis for punishment in

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24. In an appendix, Chapman has set out a number of cases which found similar or longer absolute sentences not to violate the Eighth Amendment. Obviously, these cases are inapposite, since none predicated a lengthy sentence on a wholly adventitious factor.

L.S.D. cases yields unconscionably long prison terms for crimes which, with regard to any other illegal drug, would be treated much less harshly. Within the ranks of L.S.D. dealers, carrier-weight-based sentencing produces a wierd, disparate schedule of sentencing results.

Only by turning down the lights and squinting can the Government see the statute as commanding that the "mixture or substance" to be weighed in L.S.D. cases is the weight of the carrier on which the drug is packaged.

Carrier-weight-based sentencing finds no support in either the language or history of the statute; offends against the Determinate Sentencing scheme; and runs afoul of the Fifth and Eighth Amendments to the Constitution. The Government's brief has not proven the contrary.

The judgment of the Seventh Circuit

should be reversed.

DATED:

Respectfully Submitted:

__ _____

DONALD THOMAS BERGERSON,
Attorney for Respondent,
STANLEY MARSHALL

2431 Fillmore Street,
San Francisco, CA., 94115
Telephone: (415) 621-8149

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE DRUG POLICY FOUNDATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE SUGGESTING REVERSAL

Kevin Zeese
(Counsel of Record)
Drug Policy Foundation
4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 895-1634

Alan Ellis
NACDL
1110 Vermont Ave., NW
Washington, DC 20005
(202) 872-8688

Sharon Beckman
Silverglate & Good
89 Broad Street
Boston, MA 02110
(617) 542-6663

Carol Steiker
Public Defender Service
of the Dist. of Columbia
451 Indiana Ave., NW
Washington, DC 20001
(202) 628-1200

Counsel for Amici Curiae

INTEREST OF AMICI CURIAE

The Drug Policy Foundation is a privately funded, tax-exempt, nonprofit organization concerned with the development of rational solutions to current drug problems. Its national membership includes current and former law enforcement officials, physicians, scientists, drug abuse experts, leaders of the business community, and distinguished scholars active in all aspects of drug policy.

By sponsoring publications, conferences, and public education programs, the Drug Policy Foundation provides an interdisciplinary forum for the development of sound drug policy and practice. The Foundation also participates in state and federal court proceedings to encourage rational interpretation of state and federal drug laws.

At issue in this case are the meaning and rationality of the penalty structure Congress has enacted for federal drug offenses. The Drug Policy Foundation offers its assistance to the Court because it believes that basing the penalties for drug offenses on a factor as arbitrary as the weight of the carrier vehicle would serve no rational purpose and would undermine the goals of proportionality and consistency in sentencing.

The National Association of Criminal Defense Lawyers (NACDL), including its statute affiliates, is a nationwide organization comprised of over 25,000 attorneys who are actively engaged in defending persons charged with criminal offenses and who are concerned with the proper administration of the criminal justice system.

NACDL was founded in 1958 to preserve the adversary system of justice; to maintain and foster independent and able criminal defense lawyers; and to ensure justice and due process to persons accused of crime. It pursues these goals through a variety of educational and public service activities, including national training programs, publication, committee activities, legislative action and by appearing as amicus curiae in cases presenting issues of significance

to the American criminal justice system. Significant cases in which NACDL has recently filed briefs amicus curiae in this Court include Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989); and Mistretta v. United States, 109 S. Ct. 647 (1989).

The case before the Court raises questions about the proper interpretation of a mandatory sentencing scheme and implicates the constitutional right to fairness in sentencing. The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues it presents are of such importance to the administration of the criminal justice system that NACDL should take a position and offer its assistance to the Court.

This brief is filed with the written consent of all parties.

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interpretive issue now before the Court. If a narrow reading of the statute and Guidelines, is even fairly possible", or if there is a "reasonable doubt" as to what Congress intended, then such a narrow reading must be adopted by this Court pursuant to the well established canons of statutory construction that require courts to avoid constitutional conflicts and to construe criminal statute with lenity. And even if a literal reading the statutory language unambiguously precluded the construction advocated here, the doctrine of avoiding "absurd" results would nonetheless mandate that construction.

Finally, if the Court adopted the government's construction of the statute and Guidelines, such a construction would render the relevant provisions unconstitutional under the Equal Protection component of the Due Process Clause of the Fifth Amendment, because there would exist no conceivable "rational relationship" between the widely variable weights of different LSD carriers and any legitimate punitive purpose.

ARGUMENT

I. CONGRESS DID NOT INTEND THE PHRASE "MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF" LSD TO INCLUDE CARRIERS.

A. The language and structure of the statutory sentencing scheme indicate that Congress did not intend punishment for trafficking in controlled substances to depend upon the weight of carriers or similar paraphernalia.

The penalty scheme for offenses involving the domestic manufacture or distribution of controlled substances is set out in 21

U.S.C. § 841(b). The statute establishes sentencing ranges of different levels of severity, based in part on the weight of the "mixture or substance containing a detectable amount of" the controlled substance involved. For a first offense involving a schedule I or II controlled substance, the statute authorizes imprisonment within one of three ranges -- not more than 20 years, 5 to 40 years; and 20 years to life[1] -- depending on the nature of the controlled substance and weight of the "mixture or substance" involved.

The structure of § 841(b) evidences a clear congressional design to achieve both proportionality and consistency in sentencing. Heightened penalties are imposed for offenses involving greater amounts of a "mixture or substance containing a detectable amount of" a particular controlled substance. (The individual who sells in 10 grams of a mixture or substance containing LSD receives a harsher penalty than the individual who sells in 1 gram of a mixture or substance containing LSD.) The weight-based equivalences Congress has drawn between offenses involving different controlled substances further demonstrates Congress' intent to assure that equally culpable individuals receive similar sentences. (The individual who sells 1 gram of a mixture or substance containing LSD receives the same sentence as the individual who sells 100 grams or more of a mixture of substance containing heroin.) This statutory design is consistent with Congress' overall plan to achieve proportionality and consistency in sentencing. See 28 U.S.C. § 991(b)(1)(B) (creating Sentencing Guidelines system); 18 U.S.C. § 3553(a)(6) (directing courts to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

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[1] The statute imposes heightened penalties for repeat offenders and for those whose conduct results in death or serious bodily injury. 21 U.S.C. § 841(b).

The Federal Sentencing Guidelines, which determine the sentence in a particular case within the range mandated by Congress, incorporate the weight-based equivalencies set out in section 841(b). U.S.S.G. § 2D1.1, comment (n.10) ("The Commission has used the sentences provided in, and equivalences derived from, the statute.") The Drug Quantity Table assigns a base offense level based on the "weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D1.1(c). The accompanying commentary specifies that the phrase "'mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841." U.S.S.G. § 2D1.1, comment (n.1).

The language and structure of this statutory scheme demonstrate that Congress did not intend sentences imposed for drug trafficking under section 841(b) to be based on the weight of carrier media or similar paraphernalia. Paraphernalia used to facilitate the handling and administration of a controlled substance cannot reasonably be thought to be part of the "substance containing" the illegal drug or an ingredient in the drug "mixture." Courts have routinely concluded that Congress did not intend the phrase "mixture or substance" to include paraphernalia in which the controlled substance is contained. See, e.g., United States v. Luster, 896 F.2d 1122, 1127 (9th Cir. 1990) (section 841(b)(1)(A)(iii) includes "the weight of the entire mixture or substance without packaging") (emphasis added); United States v. Smith, 840 F.2d 886, 888 (11th Cir.) (calculation of the weight of crack cocaine "mixture" did not include the weight of the 60 vials), cert. denied, 448 U.S. 859 (1988); Thomas v. United States, 239 F.2d 7, 8 (10th Cir. 1956) (excluding weight of capsule in which

heroin was contained). See also United States v. Marshall, 908 F.2d at 1317 ("That phrase cannot include all 'carriers.'").[2]

The same analysis applies to vehicles used to carry LSD. The synthetically produced compound LSD is odorless, colorless, tasteless, and produces hallucinogenic effects in extremely small doses.[3] These dosage units are far too small to handle and are therefore adhered to a carrier — typically paper, gelatin capsules or sheets, or sugar cubes — for delivery and consumption. United States v. Marshall, 908 F.2d 1312, 1315 (7th Cir. 1990) (en banc); 706 F. Supp. 650, 652 (N.D. Ill. 1989)[4] The LSD carrier, which facilities the distribution and administration of measured doses of LSD, performs the same function as gelatin capsules commonly

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[2] As part of the Anti-Drug Abuse Act of 1986, Congress also enacted a drug paraphernalia act prohibiting and punishing the sale of "any product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance." 21 U.S.C. § 857(b). The penalties Congress established for illegal sale of drug paraphernalia — imprisonment for not more than three years, a fine of not more than $100,000, and forfeiture — are not based on the weight of the illegal paraphernalia. The most logical was to harmonize the language of the paraphernalia statute with that of 841(b) is to read the phrase "mixture or substance" to exclude the vehicles used for handling or ingestion of the illegal substances.

[3] L. Grinspoon & B. Bakalar, Psychedelic Drugs Reconsidered 77 (1979); E. Brecher, Licit & Illicit Drugs: The Consumers Union Report on Narcotics, Stimulants, Depressants, Inhalants, Hallucinogens & Marijuana--Including Caffeine, Nicotine and Alcohol 347 (1972). The U.S. Sentencing Commission estimates that the average dose weighs 50 micrograms (millionths of a gram). U.S.S.G. § 2D1.1, comment (n.11) (Typical Weight Per Unit Table).

[4] Paper methods include "blotter (impregnated paper) and microdot (dried droplets on paper)." L. Grinspoon & J. Bakalar, Psychedelic Drugs Reconsidered at 77. See The NNICC Report 1989 at 88 ("blotter acid and microdots continued to be the primary forms encountered"); P. Stafford, Psychedelics Encyclopedia at 15, 73-75 (cataloguing the use of microdots, gelatin squares, blotters, ampules, sugar cubes)" "sugar cubes"); E. Brecher, Licit & Illicit Drugs at 367.

used by manufacturers and pharmacists to facilitate the delivery and administration of precisely measured dosages of lawfully purchased substances.[5]

A carrier, which functions as a drug delivery system, is different in nature and function from an agent that is mixed with a drug to dilute it or increase its apparent weight or bulk. Drug traffickers commonly adulterate the drugs they sell with less potent or even inert substances to increase the apparent quantity of the drug and, derivatively, their weight-based profits.[6] A similar phenomenon occurs in the LSD trade, albeit less frequently, when LSD tartrate is mixed with less potent substances such as phencyclidine (PCP) or methamphetamine crystals (speed) before delivery to the consumer.[7] By no stretch of the imagination, however, can the carrier medium be seen as part of the "substance or mixture," because, as the government has stipulated, LSD is sold "without

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[5] Similarly, sugar cubes have been used as a vehicle for administering the Sabin Polio vaccine. J. Smith, Patenting The Sun: Polio and the Salk Vaccine 149 (1990). Carriers that facilitate the administration of a measured dose also reduce the risk of accidental overdose. See A. Hoffman, LSD: My Problem Child at 71-73 (discussing the risks associated with preparations of LSD where the dosage is not controlled).

[6] E. Brecher, Licit and Illicit Drugs at 96-98); 1989 NNICC Report at 7 (reporting that "cutting agents were used to compensate for the perceived shortage" of cocaine "fueled by the many, well-publicized media reports of multiple seizures and other successful law enforcement initiatives in both the United States and Latin America during the latter half of 1989").

[7] LSD tartrate is a salt of LSD resulting from the combination of LSD and tartaric acid. A. Hoffman, LSD: My Problem Child 72 (1979); See 132 Cong. Rec. S. 9522 (July 23, 1986) (Statement of Sen. Hawkins) (noting the use of mixtures of LSD, PCP, and crack cocaine); P. Stafford, Psychedelics Encyclopedia 12-14 (1977) (1973 study of 405 samples of black market LSD reported 91.6% were pure LSD, 3.4% had no drug at all, 3% were actually dimethoxyamphetamine (DOM), PCP and other drugs, and 2% had DOM, PCP, and methamphetamine in addition to LSD); E. Brecher, Licit and Illicit Drugs at 376 (noting that "some black-market suppliers adulterated their LSD with a variety of substances, including amphetamines").

regard to the weight of the carrier that contains that dosage." Pet. Add. 32A; 908 F.2d at 1330 (Cummings, J. dissenting). The carrier medium functions solely as the delivery vehicle and is not part of the "mixture or substance" sold. Blotter paper, sugar cubes, and gelatin squares containing LSD are best viewed "as carriers, like the package in which a fifth of liquor is sold." 908 F.2d at 1335 (Posner J., dissenting). If the phrase "mixture or substance" is to be given the same meaning in cases involving LSD as elsewhere in the statutory penalty scheme, it must be interpreted to exclude the weight of the carrier vehicle.

This was the conclusion reached by Judges Posner and Cummings in dissents from the decision below; by Judge Gesell in United States v. Healy, 729 F. Supp. 140, 142 (D.D.C. 1990), and also by the district courts in United States v. Hanlin, No. 90-00006-01 (W.D. Pa), appeal pending (4th Cir. 1990); and United States v. Mendoza-Macias, No. 39-0932-T (S.D. Ca. 1990), appeal pending (9th Cir. 1990) (all concluding that the paper carrier was not part of a "mixture or substance containing a detectable amount of" LSD). A mixture, as Judge Gesell explained, is "'a coexistence of different ingredients or of different groups or classes of things mutually diffused through each other." 729 F. Supp. at 142 (citing 9 Oxford English Dictionary 921 (1989)). See Steadman's Medical Dictionary 882 (24th ed. 1982) (defining "mixture" as "[a] mutual incorporation of two or more substances, without chemical union, the physical characteristics of each of the components being retained"). Cocaine cut with lactose is a "mixture," but "LSD and blotter paper are not commingled in the same way as cocaine and lactose." 908 F.2d at 1317. A carrier containing or holding a controlled substance is not a "mixture," because there is no "mutual incorporation." Like a postage stamp on an envelope, LSD adhered to a carrier is not a "mixture" in the ordinary sense of the word.

Judges Posner, Cummings, and Gesell were also correct in concluding that blotter paper carrying LSD is not a "substance containing" LSD within the meaning of the statute. A "substance" is "a species of matter of definite chemical composition," or "any particular kind of corporeal matter." 729 F. Supp. at 142 (citing 17 Oxford English Dictionary 64 (1989). LSD and carrier paper -- which do not react chemically with each other and do not form a "particular" matter -- do not fall within the meaning of the word substance. The Marshall majority agreed with this conclusion, reasoning that the statutory "phrase cannot include all carriers. One gram of crystalline LSD in a heavy glass bottle is still only one gram of 'statutory LSD.' So is a gram of LSD being 'carried' in a Boeing 747." 908 F.2d at 1317.

The conclusion that the phrase "mixture or substance" does not include blotter paper or other carriers is further supported by the overall structure of the mandatory sentencing scheme. Since the nature of the carrier medium does not affect the price or potency of substance it delivers, carrier vehicles vary tremendously in size and weight. In the present case, the LSD to paper ratio ranged from 5.7 milligrams to 9.6 milligrams per dose of LSD. Marshall, 906 F.2d at 1316 n.1. In United States v. McGeehan, 824 F.2d 677, 680 n.4 (8th Cir. 1987), the gelatin carrier weighed 2.25 milligrams per dose. A sugar cube weighs around 2 grams. Marshall, 906 F.2d at 1333. These variances are quite significant in light of the fact that the average dose of LSD is .05 milligrams. U.S.S.G. § 2D1.1, comment (n.11). At the extreme, commentators report that LSD has been distributed on animal crackers,[8] and that "painting it onto the fingernails and impregnating the cloth of a man's suit have been

[8] A. Ludwig & J. Levine, Patterns of Hallucinogenic Drug Abuse, 191 JAMA 93 (1965), (cited in Organization and Coordination of Federal Drug Research and Regulatory Programs: LSD, Hearings Before the Subcommittee on Executive Reorganization of the Committee on Government Operations 89th Cong., 2nd Sess. 149 (Exhibit 11) (1966).

used for smuggling."[9] Since the weight of the average LSD dose is far lighter than any carrier, the weight of the carrier, if it is taken into account, will determine the sentence. 906 F. 2d at 1333 (Posner, J., dissenting) ("Congress might as well have said: if there is a carrier, weigh the carrier and forget the LSD."). Introducing a factor as arbitrary and variable as the weight of the delivery vehicle into the sentencing calculation would obviously destroy the weight-based equivalencies established by Congress. Since, as the government concedes, LSD is sold by dose, "without regard to the weight of the carrier that contains that dosage," Pet. App. 32A, the weight of a particular carrier bears no relation to amount of LSD sold or to the defendant's culpability. Including the carrier medium as part of the "mixture or substance" that the determines severity of the sentence would therefore run contrary to the proportionality and consistency Congress attempted to build into its sentencing scheme.

Finally, excluding the weight of the carrier medium from the weight-based sentencing calculation is also consistent with the overall structure of the Federal Sentencing Guidelines. The commentary to the Guidelines Drug Quantity Table contains a Typical Weight Per unit Table, to be used to calculate the base offense level in cases where the number of doses, but not the total weight of the "mixture or substance," is known. U.S.S.G. § 2D1.1(c), comment (n.11). The listed dosage weight for LSD -- .05 milligrams -- clearly excludes the weight of any carrier medium. Excluding the weight of the carrier paper when the weight of the "mixture or substance" is estimated, but including the weight of the carrier when the weight of the "mixture or substance" is known, makes no sense. Interpreting the Guidelines in such a manner would result in drastically different base offense levels for individuals distributing the same number of doses contained in the

[9] L. Grinspoon & J. Bakalar, Psychedelic Drugs Reconsidered 77 (1979).

same type of carrier. The only way to harmonize these guidelines provisions is to interpret them all to exclude the weight of carriers.

The Government, in its response to the petition for certiorari, argues that excluding the weight of the carrier from the sentencing calculation is "contrary to the plain language of the statute and the Sentencing Guidelines." Op. Cert. 5. This claim does not hold up under scrutiny, however. While changes made in the Anti-Drug Abuse Act of 1986 -- most notably the shift from LSD to "mixtures or substances containing" LSD, and the application of different penalty ranges for offense involving PCP and offenses involving "a mixture or substance containing" PCP[10] -- show that Congress intended to include cutting agents and adulterants (LSD mixed with amphetamines, or cocaine mixed with mannitol), as well as "pure" controlled substances it does not suggest that Congress intended to include carriers (gelatin capsules, blotter paper, sugar cubes, or glass vials). See Marshall, 908 F.2d at 1317. In cases involving heroin and cocaine, the statutory language has been interpreted to include dilutants and adulterants added to drug mixtures sold by weight but to exclude the carrier or container. See, e.g., United States v. Luster, 896 F.2d 1122, 1127 (9th Cir. 1990); United States v. Smith, 840 F.2d 886, 888 (11th Cir.), cert. denied, 448 U.S. 859 (1988). Similarly, while the phrase "mixture or substance containing" LSD includes LSD and its salts and mixtures of LSD and its salts with substances like methamphetamine crystals (speed), PCP, or crack cocaine, it does not include the carrier. Since LSD is often combined with tartaric acid and sometimes adulterated with amphetamines and other similar substances, interpreting the phrase "mixture or substance" to exclude the weight of the carriers would

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[10] 21 U.S.C. § 841(b)(1)(A)(iv) refers to "100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP). Similarly, 21 U.S.C. § 841(b)(1)(B)(iv) refers to offenses involving "10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine(PCP)."

not leave the phrase "without a referent." See United State v. Marshall, 908 F.2d at 1335 (Posner, J., dissenting).

Moreover, while several courts have agreed that statutory language commands that the weight of the carrier be included in the sentencing calculation, these same courts have disagreed about the precise meaning of the statutory language and have been unable to articulate a workable definition. The Seventh Circuit majority ruled that LSD and blotter paper are not a "substance" but are a "mixture" so long as the LSD is "inside the paper" rather than "on the blotter paper." 908 F. 2d 1312. This interpretation is contrary to the reasoning of the Marshall district court that LSD on blotter paper is not a "mixture," but a "substance." 706 F. Supp. 650. The Court of Appeals never defined a "mixture," other than to say that it is more inclusive than "substance." 908 F.2d at 1317. The district court determined that "mixture" is the more inclusive term. 706 F. Supp. at 653.

The alternate interpretation of the statutory language applied by several courts and advanced by the Government --that the phrase "substance containing" a controlled substance includes any "distinguishable kind of physical matter" containing a controlled substance"[11] -- is equally unworkable and obviously not what Congress intended. This broad interpretation of the word "substance" was rejected by both the majority and the dissenters in Marshall because it would include all containers, from the "heavy glass bottle" to the "Boeing 747." 908 F.2d 1312. Punishing LSD offenders based on the weight of the blotter paper "would be like

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[11] Op. Cert. 9; United States v. Bishop, 894 F.2d 981 (8th Cir. 1990); United States v. Daly, 883 F.2d 131 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); United States v. Taylor, 868 F.2d 125 (5th Cir. 1989) (all holding that blotter paper is a "substance containing LSD"). See United States v. Larsen, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509; United States v. Elrod, 898 F.2d 60 (6th Cir. 1990) (holding that LSD and blotter paper constitute a "mixture or substance containing" LSD).

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[11] Op. Cert. 9; United States v. Bishop, 894 F.2d 981 (8th Cir. 1990); United States v. Daly, 883 F.2d 131 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); United States v. Taylor, 868 F.2d 125 (5th Cir. 1989) (all holding that blotter paper is a "substance containing LSD"). See United States v. Larsen, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509; United States v. Elrod, 898 F.2d 60 (6th Cir. 1990) (holding that LSD and blotter paper constitute a "mixture or substance containing" LSD).

basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it." 908 F.2d at 1332 (Posner, J., dissenting). One can not attribute to Congress an intent to include the weight of LSD carriers in the sentencing calculations but not vehicles used to deliver or ingest other controlled substances, especially since the weights of the various vehicles used to carry the tiny dosage units vary so dramatically.

The Government's reliance on the "plain language of the Sentencing Guidelines," Op. Cert. 5, is also misplaced. The Sentencing Commission thinks the phrase "mixture or substance" is "unclear" and has asked Congress to "clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture of punishment purposes." Letter from William W. Wilkins, Chairman of U.S. Sentencing Commission, to Sen. Joseph R. Biden, Jr., Chairman of the Senate Judiciary Committee (April 26, 1989) (cited in Marshall, 908 F.2d at 1318). See Healy, 729 F. Supp. at 142.

Clarifying legislation has been introduced but not acted upon by the full Congress. Senator Biden introduced, in a series of "technical amendments" to the Controlled Substances Act, language clarifying that the phrase " mixture or substance" does not include the carrier medium. The senator explained that the amendment would cure the inequity caused by federal courts that have included the LSD carrier medium in the sentencing calculation. Cong. Rec. S 12748 (daily ed. Oct. 5, 1989. The amendment was withdrawn before Congress had an opportunity to act on it.

More recently, as part of the Drug and Alcohol Abuse Treatment and Prevention Improvement Act of 1990, Senator Kennedy proposed that Section 841(b)(1) be amended to "clarif[y]" that "[i]n determining the weight of a "mixture or substance" under

this section, the court shall not include the weight of . . . the carrier upon which the controlled substance is placed or by which it is transported." 136 Cong. Rec. S 7069 (daily ed. May 24, 1990). The amendment was reported favorably by Labor and Human Resources Committee on September 27, 1990. In its report, the Committee noted the conflict that has arisen on this issue among the federal courts and stated that the Court of Appeals' decision in the present case concluding that Congress intended the carrier to be weighed was "erroneous[]." S. Rep. No. 101-476, 101st Cong., 2d Sess., at 64-65.

For the reasons stated above, amici believe that language and structure of drug penalty statute indicate that Congress did not intend to make sentences for LSD offenses depend on the weight of the carrier. Though the government claims that the "plain language" compels a contrary result, judicial and administrative attempts to interpret the language and legislative efforts to clarify it at the very least "refute[] the proposition that the language of the statute and the Guidelines 'couldn't be clearer.'" Marshall, 908 F.2d at 1329 (Cummings, J., dissenting). Even if this Court were to conclude that the language and structure of the statute and Guidelines do not compel the result urged here, the legislative history and well-established canons of statutory interpretation discussed below mandate that any ambiguity in the statutory language be resolved in favor of this result.

B. The legislative history of the Anti-Drug Abuse Act of 1986 supports the conclusion that Congress did not intend sentences for drug traffickers to depend on the weight of carrier media.

Congress' amendment of the Controlled Substances Act creating mandatory five-and-ten-year penalties based on the weight of the "substance or mixture containing a detectable amount of" the

controlled substance was part of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986). The Report of the House Judiciary Committee on an earlier version of these amendments reveals that Congress' purpose was to "focus" scarce law enforcement resources and to "distinguish drug traffickers by the quantities of drugs they were responsible for selling or smuggling:

> The Committee strongly believes that the federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. . .. A second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping PCP in aluminum foil, and doing so in substantial street quantities.

H.R. Rep. No. 845, 99th Cong., 2nd Sess., at 11-12 (1986).[12] This Committee report reveals that, after studying the "distribution patterns for these various drugs," Congress adopted a "market-oriented approach," imposing mandatory minimum sentences based on "the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain." Id. at 12.

As the Committee Report makes clear, the penalties set out in section 841 are based on the weights of the "mixtures or substances" that are weighed in the drug market. Congress was apparently made aware of the use of cutting agents to increase the profits of individuals in the upper echelon of the distribution chain and

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12 The Committee was commenting on the Narcotics Penalties and Enforcement Act of 1986, which contained language different from that of the Anti-Drug Abuse Act of 1986 but was similar in that it prescribed heightened and mandatory sentencing ranges for major traffickers based on the weight of the drug mixtures involved.

therefore intended the phrase "mixture or substance" to include cutting agents commonly added to controlled substances to increase their weight. Since the market price of these mixtures is based upon the combined weight of the controlled substance and the cutting agent, Congress reasonably relied on the combined weight as an indication of role in the distribution scheme.

It is equally clear that, from a "market-oriented approach," Congress did not intend the phrase "mixture or substance" to include carrier media, whose weight plays no role in the drug market. Since Congress consulted with DEA agents and prosecutors about drug distribution patterns, Congress undoubtedly knew that LSD is "sold by the 'hit' without regard to the weight of the carrier that contains that dosage." Pet. Add. A32. Congress knew that "[n]either the price of those doses nor the number of purchasers of those doses will increase because the LSD is sold on blotter paper instead of in its granular or liquid form, and that a dealer selling LSD that weighs more because he has chosen to sell the drug on blotter paper will not be a more significant market participant than one who has chosen to sell the same number of doses in granular or liquid form." Marshall, 908 F.2d at 1330 (Cummings, J., dissenting). Basing the sentence in an LSD case on a factor as arbitrary as the weight of the vehicle would obviously undermine Congress' weight-based "market-oriented" approach to sentencing.

The contrary conclusion reached by the Chapman majority rests in part on the assumption that the bizarre results flowing from its interpretation of the penalty provision could be avoided by the wise exercise of prosecutorial discretion and selective use of the Continuing Criminal Enterprise Statute. Marshall, 908 F.2d at 1325 ("Congress may count on prosecutorial discretion to take care of the absurd cases ... and it has created the CCE Act to take care of Mr. Big.") The Committee Report indicates that Congress rejected that assumption:

> One of the major goals of this bill is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources. Up until 1984 the controlled substances law did not distinguish drug traffickers by the quantities of the drugs they were responsible for selling or smuggling. The only basis for a heightened sentence was when the defendant operated a continuing criminal enterprise (21 U.S.C. 848).

H.R. Rep. No. 845, 99th Cong., 2nd Sess, at 11. Congress was well aware of the Continuing Criminal Enterprise statute, thought that it had not accomplished proportionality in prosecution and sentencing, and established a new weight-based market-oriented sentencing scheme to solve — and not to exacerbate — these problems.

II. WELL-ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION MANDATE THE ADOPTION OF AMICI'S CONSTRUCTION OF THE STATUTE AND GUIDELINES

In Part I of this Brief, amici have argued that the best construction of Congress' intent, based on the language, structure, and legislative history of the statute and Guidelines, is that the carrier medium on which LSD is adhered was not meant to be part of the weight of the "mixture or substance containing a detectable amount" of the drug for sentencing purposes. Even if this construction were not the best one, however, its adoption would nonetheless be compelled if the import of the statute and Guidelines were at all ambiguous by well-established canons of statutory construction.

A. The rule of avoiding constitutional conflicts mandates the adoption of amici's construction of the statute and Guidelines.

A venerable rule of statutory construction requires that statutes be construed to avoid serious doubts about their constitutionality. This "cardinal principle" was already well-established in 1932 when this Court described it as follows: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932).[13]

This rule finds its source in the judiciary's respect for the legislature as a coordinate branch of government. By avoiding potential constitutional pitfalls in the interpretation of federal statutes, the Court "recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988). Thus, the Court gives Congress the benefit of the doubt by presuming that Congress intended to legislate constitutionally. In addition, the rule respects the balance between the legislature and the judiciary by reserving the Court's authority to define the precise limits of legislative power — the authority to draw constitutional lines in the sand — for those cases in which the exercise of such authority is absolutely

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13 Accord Public Citizen v. Department of Justice, 109 S. Ct. 2558, 2572 (1989); Frisby v. Schultz, 487 U.S. 474 (1988); DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500-501 (1979); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); Schneider v. Smith, 390 U.S. 17, 26 (1968); Machinists v. Street, 367 U.S. 740, 749-750 (1961).

necessary. Id. (The rule "reflects the prudential concern that constitutional issues not be needlessly confronted.") Finally, the rule respects the legislature's handiwork because it permits the Court "to preserve so much of the statute as can constitutionally be preserved" rather than send Congress "back to the drawing boards" with no effective enactment in the meantime. United States v. Marshall, 908 F.2d at 1337 (Posner, J., dissenting) (Given the choice between having the LSD statute and Guidelines declared unconstitutional and having a constitutional interpretation of them adopted by the Court, "we can be reasonably certain that Congress would have preferred the second course.") In applying the rule, courts are to adopt a saving construction if "reasonably possible," United States v. Shreveport Grain & Elevator Co., 287 U.S 77, 82 (1932), but should stop short of "perverting the purpose of a statute" or endorsing a construction of a statute that is "plainly contrary to the intent of Congress." Scales, 367 U.S. at 211; DeBartolo Corp., 485 U.S. at 575.

Application of the rule to the instant case mandates that the Court adopt amici's construction of the statute and Guidelines. First, the interpretation urged by amici is much more than "fairly possible." Amici has amassed significant support for the proposition that excluding the weight of the carrier medium from the weight of LSD for sentencing purposes is the best construction of the provisions at issue in this case, based on their language, structure and legislative history. See supra Part I.

Moreover, and most significantly, the construction urged by amici does not in any way "pervert" Congress' purpose or intent in enacting the statute and Guidelines. To the contrary, this construction is the only way to avoid perversion of Congress' evident and uncontested purposes. See Part I.B. supra.

The constitutional doubts raised about the statute and Guidelines under the interpretation urged by the government are evident and "serious." To base sentencing determinations, and

especially the applicability of mandatory minimum terms of imprisonment, on a factor as arbitrary as the weight of the LSD carrier medium would violate petitioners' right to due process of law — that is, their right to have Congress set their punishment based on a factor that bears some rational relationship to a legitimate governmental goal. See infra Part III (elaborating constitutional argument). Thus, proper application of the rule of avoiding constitutional conflicts mandates the result urged by amici.

B. The rule of lenity mandates the adoption of amici's construction of the statue and Guidelines.

The rule of lenity — "the rule that penal laws are to be construed strictly" — is at least as old as the rule of avoiding constitutional conflicts. See United States v. Wiltberger, 5 Wheat 76, 95 (1820) (Marshall, C.J.). This time-honored rule not only ensures fair notice to criminal defendants about the consequences of their actions, see Crandon v. United States, 110 S.Ct. 997 (1990), it also tends "to minimize the risk of selective or arbitrary enforcement and to maintain the proper balance between Congress, prosecutors, and courts." United States v. Kozminski, 487 U.S. 931, 952 (1988). So that its multiple purposes are served, the rule of lenity has been applied equally to the interpretation of substantive criminal statutes and to sentencing provisions.[14] In its most recent discussion of the application of the rule of lenity, this Court explained that lenity applies to "those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." Moskal v. United States, 111 S.

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[14] See Hughey v. United States, 110 S. Ct. 1979, 1985 (1990); Bifulco v. United States, 447 U.S. 381, 387 (1980); Simpson v. United States, 435 U.S. 6, 14-15 (1978); Ladner v. United States, 358 U.S. 169, 178 (1958).

Ct. 461, 465 (1990) (quoting Bifulco v. United States, 447 U.S. at 387). If any of the traditional guides to interpretation listed by the Court give rise to a "reason to doubt" Congress' intent to sweep broadly, then lenity should apply and the statute should be construed narrowly.

As amici explained Part I, supra, each of the traditional guides to interpretation gives rise to a multitude of reasons to doubt Congress' intent to include the weight of the carrier medium in the weight the "mixture or substance containing a detectable amount" of LSD for sentencing purposes. Moreover, the harms sought to be avoided by the rule of lenity would materialize in this case if the rule were not applied. Given the lack of any workable definition of "mixture or substance," defendants cannot fairly be said to have notice of the statutory consequences of their actions. Prosecutors would be given enormous power to select which LSD offenders — some of whom may have small amounts of LSD but very weighty carriers — to charge under the mandatory minimum statutory provisions. Finally, if this Court were to inject a variable that has nothing to do with the defendant's culpability into a sentencing scheme intended to achieve proportionate sentencing, it would violate the "plain principle that the power of punishment is vested in the legislative, not in the judicial department." United States v. Wiltberger, 5 Wheat 76, 95 (1820) (Marshall, C.J.). In light of the reasons to doubt the government's interpretation of Congress' intent and the consequences of adopting such an interpretation, the rule of lenity should be applied to adopt amici's narrower construction of the provisions at issue in this case.

C. The rule of avoiding absurd results mandates the adoption of amici's construction of the statute and Guidelines.

The rule of avoiding constitutional conflicts and the rule of lenity are applicable only if "fairly possible" or if the statute at issue leaves a "reasonable doubt" as to its intended scope. Yet the Court of Appeals in the instant case found that the language of the statute and the Guidelines was so crystal clear as to leave no room for the operation of these rules. United States v. Marshall, 908 F.2d at 1318. This is also the position advanced by the government in support of the position below. Op. Cert. at 9 ("There is 'no ambiguity' in the language of the statute or the Guideline."). Yet even if the Court of Appeals and the government were correct that a literal reading of the statutory terms would preclude amici's construction, the third rule of interpretation compels the Court to look beyond the literal reading of the statute when such a reading would lead to "absurd or glaringly unjust results." Sorrells v. United States, 287 U.S. 435, 450 (1932).

This rule of construction was most succinctly stated by the Court in 1892:

> [F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).[15] This Court most recently applied this rule in Public

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[15] Ancient common law examples of such absurdity include applying a statute banning obstruction of the mails against a sheriff who was executing a warrant to arrest the mail carrier for murder, or applying a medieval law against drawing blood in the streets against a physician who came to the aid of a passerby who fell down in the street in a fit. See id. at 2565-2566; United States v. Kirby, 7 Wall 482, 487 (1869). This rule of avoiding absurdity has been adhered to consistently by this

Citizen v. Department of Justice, 109 S. Ct. 2558 (1989), holding that although a literal reading of the Federal Advisory Committee Act would extend its application to the Justice Department's solicitation of the ABA Committee's views on prospective judicial nominees, such a result would be so unreasonable as to cast doubt on whether Congress truly intended it. In support of its holding, the Court quoted approvingly from Judge Learned Hand to the effect that while "the words used, even in their literal sense are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purposes or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Id. at 2566 (quoting Cabell v. Markham, 148 F.2d 737, 739 (CA2), aff'd, 326 U.S. 404 (1945)).

In the instant case, if the words "mixture or substance" were read as the government contends they must be, the results would be patently absurd and plainly inconsistent with Congress' purposes of focusing scarce law enforcement resources and treating like offenders alike. The glaring absurdity created by such a reading is the keying of punishment for LSD traffickers to an arbitrary and meaningless detail — the weight of the carrier medium — which bears no relationship to the weight or number of doses of the drug, the market value of the drug, or the harm to society from its distribution. Such a reading would punish LSD traffickers in a manner grossly disproportionate to the treatment of purveyors of cocaine and heroin, see United States v. Marshall, 908 F.2d at 1335 (Posner, J., dissenting), and it would punish LSD traffickers whose

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Court throughout this century.See United States v. Wells Fargo Bank, 485 U.S. 351 (1988); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982); United States v. American Trucking Assns., Inc., 310 U.S. 534, 543-544 (1940).

carrier weight was known more than LSD traffickers whose dosage alone was known — by a factor of more than 100. See 908 F.2d at 1315. These absurdities, so inconsistent with the general purposes of the provisions at issue, compel this Court to conclude that Congress did not intend what the government contends is the literal meaning of the statutory language.

III. THE GOVERNMENT'S INTERPRETATION OF THE STATUTE AND GUIDELINES WOULD RENDER THEM UNCONSTITUTIONAL.

If the Court were to reject amici's construction of the state and Guidelines urged in Parts I and II and to accept the government's reading, the statute and Guidelines would violate the constitutional guarantee of Equal Protection of the Laws, made applicable to the federal government through the Due Process Clause of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954). For a provision to withstand an Equal Protection challenge, the legislative classifications must be "rationally related to a legitimate governmental interest." Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973). This so-called "rational basis test" contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, the Court has explained that these limitations amount to a prescription that "all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); see Plyler v. Doe, 457 U.S. 202, 216 (1982); Reed v. Reed, 404 U.S. 71, 76 (1971). As this Court has stated on many occasions, "the rational- basis standard is 'not a toothless one." Schweiker v. Wilson, 450 U.S.

221, 234 (1981) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).[16]

Applying the rational basis standard to the instant case, it is apparent that the government's construction of the statute and Guidelines cannot pass constitutional muster. The problem lies not in the general goals of the statute and Guidelines, for it is surely a legitimate goal to set out a graduated schedule of punishment for drug traffickers. Rather, the problem lies in the lack of a rational relationship between the weight of the LSD carrier medium and any possible punitive purpose. The legislative history makes clear that Congress included the weight of the "mixture or substance containing a detectable amount" of a controlled substance in the weight of the drug for sentencing purposes because Congress sought to punish more severely those traffickers who dealt with larger quantities of controlled substances. See H.R. Rep. No. 845, 99th Cong., 2d Sess, at 11 (1986) (House Committee Report on the Anti-Drug Abuse Act of 1986). But for LSD, which the government has stipulated is sold by dose and not by weight, the weight of the carrier bears no relationship at all to the quantity of LSD possessed by a trafficker in the drug. Nor does the weight of the carrier medium bear any relation to any other conceivable punitive purpose — i.e., the number of doses of LSD available for distribution, the market value of the LSD, or the social harm caused by the distribution of the drug. Rather, the weight of the

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16 Its lack of "toothlessness" has been demonstrated over the years by its invalidation of a wide range of legislation. See, e.g., Hooper v. Bernalillo, 472 U.S. 612 (1985) (classification based on length of residency); Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (classification based on mental retardation); Bearden v. Georgia, 461 U.S. 660 (1983) (sentencing classification based on indigence); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (classification based on processing time by state Fair Employment Practices Commission); Jiminez v. Weinberger, 417 U.S. 628 (1974) (classification based on illegitimacy); Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (classification based on relationship of household members); Department of Agriculture v. Murry, 413 U.S. 508 (1973) (classification based on claim of adult child as tax dependent).

carrier medium is a completely arbitrary factor, and the weight of the carrier is so much greater than the weight of the LSD adhered to it that the carrier weight alone — the arbitrary factor — that completely determines the punishment in LSD cases. "[T]o base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant." United States v. Marshall, 908 F.2d at 1333 (Posner, J., dissenting).

When this case was before the Court of Appeals, the Department of Justice was unable to advance any rational relationship between the weight of the carrier medium and the graduated scale of punishment for trafficking in LSD. Undeterred, the Court of Appeals posited three conceivable bases for determining punishment based on the weight of the carrier medium. In doing so, the Court of Appeals simply invented crucial "facts" to support its claims without a shred of record evidence. Moreover, the reasons advanced by the Court of Appeals, even with the invented facts, still fail to provide a rational justification for counting the weight of the carrier medium for sentencing purposes.

First, the Court of Appeals reasoned that "blotter paper apparently has contributed to the renewed success of the drug, making it easy to transport, store, conceal, and sell." 908 F.2d at 1324. There is absolutely no record evidence that LSD has had any "renewed success," or that if it has, such success was due to a sudden advent of blotter paper. See 132 Cong. Rec. S. 9049 (July 15, 1986) (statement of Sen. Hawkins) ("the use of ... LSD declined substantially in the past 5 years.") Along the same lines, the Court of Appeals furthered reasoned that because blotter paper is a "tool of the trade," it is rational to make the penalty for LSD trafficking "depend on a carrier that is essential to successful distribution of the drug." Ibid. It is reasonable since blotter paper, like other drug paraphernalia, can play an essential role in transportation, sale, or ingestion of controlled substances it is reasonable for Congress to

prohibit and punish its sale.[17] The problem is that it makes no sense to punish the possession of such paraphernalia by its weight. Congress might equally well seek to punish the use of glassine bags, plastic vials, tin foil packets, cigarette papers, pipes, and hypodermic needles — all of which play a role analogous to that of blotter paper. But it would be fundamentally irrational for Congress to punish the use of these implements by their respective weights because the relative weights of various packaging materials and other drug paraphernalia bear absolutely no correlation to the amount of drugs they can transport, contain, or conceal. Thus, the first basis offered by the Court of Appeals for counting the weight of the carrier medium fails miserably at achieving "rationality."

Second, the Court of Appeals reasoned that because "in 99% of all cases, LSD is sold in blotter paper," we need not "worry" about the anomalous treatment of sugar cubes and pure liquid LSD. Ibid. There is no record support for the "99%" figure, nor for the dual propositions that "[n]o one has been prosecuted for distributing LSD in sugar cubes in the last twenty years" and "no one has been prosecuted for possessing significant quantities of pure LSD in the last decade." Ibid. It is possible that there are no reported appellate decisions that reflect such prosecutions, but the Court of Appeals would have no way of knowing what actual prosecutions took place across the country, resulting in a variety of dispositions not necessarily subject to reported appellate decision, in the past twenty years.[18] Moreover, and perhaps more to the point, the Court of Appeals ignores evidence that there has been at least one prosecution recently for the possession of LSD on gelatin,

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[17] See 21 U.S.C. §857 (imposing punishments for sale of drug paraphernalia without regard to weight).

[18] See, e.g., United States v. Lowden, No. 89-00031-1 (D.Ma. 1989) appeal docketed, No. 90-1605 (CA 1990) (defendant possessed 5.7 grams of a liquid containing LSD in a vial).

which weighs considerably less than blotter paper. See United States v. McGeehan, 824 F.2d 677, 680 n.4 (8th Cir. 1987) (1,000 hits of LSD on gelatin weighed 2.25 grams, or 2.25 mg. per dose, as compared with 5.7 mg. per dose on petitioner Chapman's blotter paper and 9.6 mg. per dose on respondent Marshall's blotter paper). And it is quite clear from the reported appellate decisions regarding blotter paper alone that blotter paper ranges significantly in weight, with massive effects on sentencing. Marshall, 908 F.2d at 1316 n.1 Thus, defendants move in and out of the ambit of mandatory minimum sentences and are given widely varying base offense levels under the Guidelines based on the arbitrary weight of their carriers.

It is no answer to these pervasive anomalies to assert that "prosecutorial discretion" will take care of it. 908 F.2d at 1325. First, as we know from the legislative history of the Anti-Drug Abuse Act, Congress wanted the mandatory sentencing scheme to direct prosecutors, not the other way around. See Part I. B. supra. Second, while it is possible that prosecutorial discretion might take care of the truly ridiculous case of one hit of LSD on a 2-lb brick, it is clear that prosecutorial discretion is not taking care of the anomalies listed above. After all, these anomalies are present in this very case, given the significant disparity in the weight of the blotter paper among the codefendants now before the Court. The United States has exercised no prosecutorial discretion in this or any other case to prevent penalties from turning on the arbitrary weight of the carrier medium. And even if the United States did choose to exercise discretion and not charge certain cases under the mandatory minimum sentencing provisions, the prosecutor's discretion does not extend to changing the way base level offenses are computed under the Guidelines. Finally, either the statutory scheme is rational, or it is not. The possibility that the proper exercise of prosecutorial discretion might mitigate some of the

worst irrationality does not make the underlying scheme more rational or less arbitrary on its face.

Third and finally, the Court of Appeals posits the possibility that Congress included the weight of the carrier paper as part of the weight of the drug in order to avoid the difficulty of accurately weighing the drug itself, which is present only in "an exceedingly small quantity." 908 F.2d at 1325. Once again, there is absolutely no support in the record for the proposition that it is much more difficult to weigh LSD than to find out whether it is present on a carrier medium. Indeed, almost every reported decision at both the trial and appellate levels has included the weight of the LSD as well as the weight of the carrier medium. There is simply no reason to believe that such weights are difficult to obtain, either directly or by extrapolation. Moreover, and again perhaps more to the point, even if it were true that Congress believed that the actual weight of the LSD were too hard to obtain accurately, Congress would not be free to substitute for the weight of the drug itself the weight of something wholly unrelated to the quantity of the drug present. Congress is free to address any difficulty that might exist in accurately weighing LSD, but only in a manner that can be deemed rational. Indeed, the matter is handled by the Sentencing Guidelines, which set out the average weight per dose estimates to be used "if the number of doses ... but the weight of the controlled substance is known." U.S.S.G. § 2D1.1, comment (n.11). In contrast, the notion of substituting the weight of a carrier, which varies by factors at least as high as one hundred from the weight of the drug itself and from the weight of other carriers, is pure irrationality.

Perhaps recognizing that its purported "rational bases" for counting the weight of the carrier medium fail to rationalize the statute and Guidelines in any meaningful way, the Court of Appeals notes, with some exasperation, that irrationality is inevitable in any sentencing scheme: "Every attempt to make the system of

sentences 'more rational' carries costs and concealed irrationalities, both loopholes and unanticipated severity." 908 F.2d at 1326. This observation is no doubt correct, but it misses the point of defendants' and amici's challenge in the instant case. The problem with the government's construction of the statute and Guidelines at issue in this case is not that it might permit some unfair results because of "unanticipated loopholes" or "concealed irrationalities," but rather, that it makes punishment turn in every case on a factor bearing no rational relationship to culpability in any conceivable sense. There is an essential difference between a sentencing scheme that is arbitrary because of the inherent frailties of human nature and one that is arbitrary by design. The irrationality of the government's construction is pervasive and inescapable. While petitioners' may not have the right to a perfect sentencing scheme, they do have the right to one that is not fundamentally arbitrary. This is the core meaning of the Equal Protection of the Laws — the right to be free from the fundamentally arbitrary exercise of governmental power. If the government's construction of the statute and Guidelines is adopted in this case, those provisions must be invalidated in light of the Equal Protection component of the Due Process Clause of the Fifth Amendment.[19]

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[19] Alternatively, one could conceive of the right to be free from the arbitrary infliction of punishment as a right to be free from "cruel and unusual punishment" under the Eighth Amendment. See, e.g., Furman v. Georgia, 408 U.S. 249, 250 (1972) (Douglas, J.) (A penalty "should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.") Whether one considers the right to be free from arbitrary governmental action under the Equal Protection clause or the Eighth Amendment, the analysis would be the same: one would have to determine whether the legislature could be said to have acted rationally, i.e., whether the legislative action bore a rational relationship to a legitimate governmental goal.

CONCLUSION

For the reason given above, amici urge this Court to reverse the decision below.

Respectfully submitted,

Kevin Zeese *
Drug Policy Foundation
4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 895-1634

Alan Ellis
NACDL
1110 Vermont Ave., NW
Washington, DC 20005
(202) 872-8688

Sharon Beckman
Silverglate & Good
89 Broad Street
Boston, MA 02110
(617) 542-6663

Carol Steiker
Public Defender Service
of the Dist. of Columbia
451 Indiana Ave., NW
Washington, DC 20001
(202) 628-1200

Attorneys for Amici Curiae
* Counsel of record